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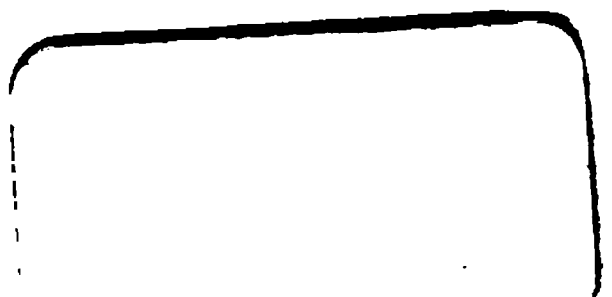
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AMERICAN REPORTS:

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ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

BY THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

VOL. XIII.

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‡ Appointed Judge of the Court of Appeals December 29, 1873.

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CASES
IN THE
SUPREME COURT
OF
TENNESSEE

Moss v. BETTIS, plaintiff in error.

(4 Helsk. 661.)

Common carrier — one who carries pro hac vice.

Defendant undertook for hire, to transport plaintiff's goods in his boat. **Held,** that he thereby made himself liable as a common carrier.

ACTION for damages. The opinion states the case.

S. R. Latta, for plaintiff in error.

Richardson & Moss, for defendant.

SNEED, J. This action was to recover damages for the loss and injury to two boat-loads of lumber which the defendant's intestate, Joel Peel, in his life-time, in the summer of 1860, undertook for hire, to carry from Chestnut Bluff on the Forked Deer river, in the county of Dyer, to the city of Memphis. After the boats had proceeded down the river some fourteen miles from the point of departure, they struck some obstruction in the stream and were sunk, which occasioned the loss of some of the lumber and the injury of much of that which was recovered; the greater part of

the lumber was, however, after some weeks' delay, delivered to the owner and consignee at the city of Memphis. The judgment and verdict below were for the defendant's intestate.

The defendant's intestate is sought to be charged as a common carrier, and the main question controverted in the case is, whether, in this undertaking, he is to be held to the responsibility of a common carrier or that of a private carrier. There was much testimony submitted to the jury tending to show the alleged negligence of the defendant's intestate, and his want of skill and prudence in overloading the boats, and in the management thereof as they descended the river, as well as his delay and alleged indifference in rescuing the cargo after the accident. We forbear, however, to criticise the evidence, or to intimate an impression as to its force and effect. Under the contract, the plaintiff was to furnish one of the boats and its crew, and the defendant's intestate was to furnish the other, and have the command and control of both for the voyage. The larger boat of the two was furnished by the defendant's intestate, and it seems from the testimony of the witness Jordan, that the defendant's intestate had constructed the boat to be used in the transportation of staves. The defendant's intestate had, for many years, been a boatman, and was regarded as a very skillful and experienced person in that business, and on account of his accredited skill in navigating those waters, he could command business as a carrier and boatman when no one else could. The witness Harris thus characterizes his vocation as a boatman: "Peel was a boatman, but worked on his farm long enough after he was married to make a crop. After crops were laid by, he was in the habit of running boats on the river, carrying off lumber, staves, etc. He run boats for himself and any one else who would employ him. He was an experienced boatman, and could get employment when no one else could."

The principles announced in the charge of the court defining the distinction between common carriers and private carriers, and the character and degree of responsibility to which they are respectively held, are in the abstract correct. But his Honor charged the jury among other things, as follows: "If the defendant had fitted out a flat-boat for the purpose of running the Forked Deer river from Chestnut Bluff to any other point on the Forked Deer river, or on the Mississippi river, for the purpose of carrying freight indiscriminately for others, and receiving pay for the same, he would be a common

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carrier. But if the testimony shows that the defendant built a flat-boat for the purpose of shipping staves down the Forked Deer river for himself, and after building the boat, he had abandoned the idea of shipping his own lumber, and entered into a special contract with the plaintiff to ship his load of lumber for him from Chestnut Bluff to Memphis — loaded his boat exclusively with the plaintiff's lumber, and received, or proposed to receive, no other freight, except that of the plaintiff, he would be a private, and not a common carrier."

We think this portion of the charge, as a whole, is erroneous; and it was doubtless such an error under the peculiar facts of this case as most injuriously affected the plaintiff. It excludes the idea that even in an isolated act, or in occasional acts of carrying, a party may assume all the burdens and responsibilities of a common carrier. It has long been a settled doctrine of the law, that a party may, by express contract, assume, in any act of carrying goods for another, and by any means of transportation, all the risks of a common carrier. 2 Kent's Com. 778; *Robinson v. Dunmore*, 2 Bos. & Pul. 416; *Brind v. Dale*, 8 Carr. & Payne, 207. But the rule has been extended even further than this, and it was held in the case of *Gordon v. Hutchinson*, Watts & Serg. 285, that a wagoner who carried goods for hire, was responsible as a common carrier, though transportation was only an occasional and incidental employment; and this case is cited approvingly in a note to 2 Kent, 778, where it is said that it seems to be founded in the better policy as applicable to business in this country. It is true, that common carriers undertake generally, and not as a casual occupation, and for all people indifferently; but in order to make them such, it is not necessary that this should be their exclusive business, or that they should be continuously or regularly employed in it. They may combine it with another and several avocations, and yet be common carriers, and subject to the "extraordinary liabilities which have been imposed upon them in consequence of the public nature of their employment, which renders their fidelity a matter of importance to all the community alike:" 1 Smith's Lead. Cas. 363. The private carrier is at least liable for his negligence, as it is not to be supposed that a man of ordinary prudence will be guilty of that degree of negligence about his own affairs as to do himself or his property a serious injury; and he is held to the same degree of care that a prudent man would exercise about his own affairs. Because, in the language of Lord

HOLT, "it is only a private trust and a particular office, and he doth the best he can, as the nature of the thing puts it in his power to perform." *Coggs v. Bernard*, cited in Ang. on Carriers, 547. And thus says Lord ABINGER, "if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good all losses arising from the negligence of his servants." *Brind v. Dale*, 8 Carr. & Payne, 207. In *Dwight v. Brewster*, 1 Pick. 50, Chief Justice PARSONS defines a common carrier "to be one who undertakes for hire to transport the goods of such as choose to employ him from place to place;" "and this," he added, "might be carried on at the same time with other business." And it is said to be well settled in this country, that a person who undertakes, though it may be only *pro hac vice*, to act as a common carrier, that is, to carry for hire without special contract, thereby incurs the responsibility of a common carrier." Ang. on Carriers, § 70. And the rule in this State is, that one who undertakes for reward to convey produce from one place upon the river to another, becomes thereby liable as a common carrier. *Turney v. Wilson*, 7 Yerg. 340; *Craid v. Childress*, Peck's R. 270. In the case first cited, Judge GREEN says: "It has been so frequently holden by this court that one who undertakes for a reward, to convey produce or goods of any sort, from one place upon the river to another, becomes liable thereby as a common carrier, that it is unnecessary to do more here than to refer to the cases." And he cites *Craig v. Childress*, Peck's R. 270; *Johnson v. Friar*, 4 Yerg. 48; *Gordon et al. v. Buchanan et al.*, 5 id. 71. And so it was held in North Carolina, that freighters for hire upon navigable rivers are to be considered as common carriers, and subject to their liabilities. *Williams v. Branson*, 1 Murphey, 417. There may be sound reason in holding all river freighters for hire to the responsibility of common carriers, in the fact that, in view of the extraordinary perils of a river navigation in this country, he who takes upon himself even the occasional trust of freighting by the river, thus avouches his own skill in navigation, and trustworthiness as a carrier, and is apt to command the confidence of the community at large. And thus one who would recklessly encounter the perils of a river carrier, without competent skill or knowledge of such navigation, would be guilty of that kind of gross neglect as the trustee of another, which among the Roman lawyers was called *lata culpa*, and which was considered equivalent to fraud, and which consists, according to

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Sir WILLIAM JONES, in the omission of that care and caution which even inattentive and thoughtless men never fail to take of their own property. Ang. on Carr., § 10. The solution of the question, whether the defendant's intestate was to be considered as a common carrier or a private carrier, did not depend in any degree upon the fact that he had built a boat for the freighting of his own cargo of staves, and had, at the instance of the plaintiff, abandoned that project, and contracted to ship the plaintiff's lumber, nor does it depend upon the fact that he had loaded his boat exclusively with the plaintiff's lumber, and that he received and proposed to receive no other freight, except that of the plaintiff. And the jury may very well have been misled by the prominence given to these immaterial circumstances in the charge.

The judgment will be reversed, and the cause remanded for a new trial.

YANCY V. YANCY.

(5 Heisk. 353.)

Constitutional law — Statute of limitation.

After the bar of the statute of limitation has become complete, neither the legislature nor a constitutional convention can revive the remedy or furnish a new one.

THE opinion states the case.

S. Hill, for complainants.

G. B. Black, for defendant.

NICHOLSON, C. J. The bill in this case is filed to settle the administration of the estate of Charles L. Yancy; to have an account of the advancements, and partition or sale of the real estate.

The proof in the cause shows that in December, 1861, the intestate put into the possession of his daughter, Sarah A. Duke, a negro woman, Betsy, and charged the same on his book as an

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advancement, at \$500. It further appears by the proof, that in January, 1862, he put into the possession of his daughter, Martha Patton, the negress Mariah and her children, and charged them on his book as an advancement, at \$1,500. The two daughters took possession of the negroes and held them until they were emancipated, but it does not appear that they knew of their being charged to them as advancements.

The chancellor held, that the negroes were to be charged as advancements in the account. From this holding the two daughters and their husbands have appealed to this court.

The first question arising upon these facts is, were these gifts to the daughters such advancements as constituted valid charges against them, in the settlement of the estate? An advancement is an irrevocable gift by a parent, who afterward dies intestate, of the whole or part of what it is supposed the child will be entitled to on the death of the party making the advancement. 2 Williams on Executors, 1350.

By section 1766 of the Code, "all gifts of slaves shall be in writing, or be utterly void and of no effect whatever."

The writing required to make the gift of a slave valid must be understood as meaning such written instrument as would be proper to convey the title. A mere memorandum made by the donor in his own book, without the knowledge or concurrence of the donee, cannot be regarded as such compliance with the statute as the law contemplated. If a gift at all, therefore, it was a parol gift, and communicated no title. *Neely v. Wood*, 10 Yerg. 486; *Crippen v. Bearden*, 5 Hum. 129.

The title to the slaves continued in Charles L. Yancy, and could not be charged to his daughters as advancements, unless they held them long enough to perfect their titles under the statute of limitations.

This brings us to the question, whether the fourth section of the schedule to the constitutional amendments of 1865, and the act of 1865, ch. 10, suspending the statutes of limitation from the 6th of May, 1861, to the 1st of January, 1867, were operative as valid laws? This exact question was determined by this court in the case of *Girdner v. Stephens*, 1 Heisk. 280; 2 Am. Rep. 700. In that case it was held, that a "right to a defense complete under the statute of limitations cannot be taken away by a statute, ordinance of a constitutional convention, or amendment of the constitution."

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If this decision is adhered to and is applicable to the facts, it is conclusive of this branch of the case.

The correctness of the decision in *Girdner v. Stephens* has been controverted by counsel with marked ability, and we have listened to the argument with much interest, being entirely willing, and even anxious, to correct any error into which we may be shown to have fallen.

There can be no debate at this day as to the proposition that a convention of a people of a State, in making or amending their fundamental law, is restricted in its powers only by the limitations of the Federal constitution. We yield a ready assent, also, to the proposition, that the judicial department will not declare an act of the legislative department unconstitutional, unless its violation of either the Federal or State constitution is clear and free from doubt. And we hold it an equally sound doctrine, that when the judicial department is called upon to determine whether a convention of the State has introduced into its constitution a clause in violation of the constitution of the United States, the paramount duty of sustaining the Federal constitution should require it to be clearly made out, that the State constitution is in harmony with the Federal constitution. Bound, as we are, by most solemn obligations to support and protect both of these constitutions, we have re-examined the questions so thoroughly discussed before us, with no other feeling than anxious solicitude to discharge our whole duty.

The fourth section of the schedule of 1865 declares, in general terms, that "no statute of limitations shall be held to operate from and after the 6th day of May, 1861, until such time hereafter as the legislature may prescribe." This prohibition applies as well to cases in which the bar of the statute had become complete, before the date of the schedule, as to those in which the bar had not then become complete. As to the power to extend the remedy in the latter class of cases, no question is raised. But in those cases in which, by the completion of the bar, no remedy existed at the date of the schedule, did the convention have the power, in harmony with the provisions of the Federal constitution, to revive the lost remedy or to furnish a new one?

The Federal constitution declares that "no State shall pass any law impairing the obligation of contracts." The inhibition is against impairing the obligation of a contract, and not the contract itself. In every case that arises, in which this question is involved,

it is essential that it be ascertained what the obligation of the contract is which is alleged to be impaired.

In the case of *McCracken v. Haywood*, 2 How. 608, the court say: "In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and mode of proceeding by which it was to be carried into execution; annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

To determine the question before us, we will make a practical application of the principles and rules, so clearly laid down by the supreme court, to the contract, the obligation of which is alleged to be impaired by the legislation of the State.

The contract between Charles L. Yancy and his daughters was, that he gave each of them a slave and delivered the possession. But this contract was by parol, and therefore void, at the election of the donor. The daughters received the slaves in accordance with the parol contract. The contract was made with reference to the law as it then existed, and formed part of it, as the measure of the obligation to perform by the one party, and the right acquired by the other to enforce it. As the law then was, it recognized the right of the donor to reclaim the slaves at any time within three years—and the duty of the donees to restore them, if required

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within that time. The law provided a remedy for the donor to recover the slaves and to enforce his right, provided he should resort to that remedy within that time. But the law also provided that if he did not exercise his right of reclamation within three years, then he forfeited his remedy and his right to the slaves, and the law vested the right to them in the donees. 2 Meigs' Dig., p. 738, § 1274.

Such was the contract and such its obligation, as measured by the law then in force. But we proceed a step further. The donor failed to reclaim the slaves within the three years. By the terms of the contract, and its obligation as measured by the law in force, the title of the slaves passed out of the donor into the donees. The title became as perfect and absolute in the daughters as if they had been conveyed by bills of sale and for full prices paid.

This was the legitimate consequence of the contract of parol gift, and the law with reference to which the contract was made. So soon as the three years expired, without the assertion of his right of reclamation, the same law at once raises an implied contract, on the part of the donor, that the daughters shall hold the slaves free from any claim on his part. This implied contract necessarily springing out of the original contract, came at once under the protection of the constitution of the United States. The obligation of that implied contract consisted in its binding force on the donor with whom it was made. It became not merely a vested right in the daughters, but a vested right sustained and protected by the obligation imposed by law on their father not to disturb their right. This is what Judge SHIELDS meant, in the case of *Girdner v. Stephens*, when he said: "We hold, both on authority and principle, when a cause of action is barred by a statute of limitations in force at the time the right to sue arose and until the time of limitation expired, that the right to rely upon the statute as a defense is a vested right that cannot be disturbed by subsequent legislation."

It was not held in that case, nor intended to be held, that there were no vested rights which could be impaired by subsequent legislation. The numerous instances in which the courts have held that vested rights might be divested by subsequent legislation, without violating the Federal constitution, were examined and considered in preparing the opinion in that case, and they were not regarded as in conflict with the conclusion announced. Those cases (and they have been cited in this argument) establish the proposition

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that the prohibition of the Federal constitution does not prevent the States, either through their conventions or legislatures, from impairing vested rights, provided always those vested rights are not so dependent on the obligations of contracts as to render them obnoxious to the prohibition of the Federal constitution. The remarks of Judge COOLEY, at page 369, fully sustain the conclusion in the case of *Girdner v. Stephens*, and seems to us to place the question in a light that is unanswerable: "As to the circumstances under which a man may be said to have a vested right to a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations, is equally protected. In both cases the right is gone; and to restore it would be to create a new contract for the parties — a thing quite beyond the power of legislation."

Why is the right acquired by the lapse of the time prescribed for effectuating the bar of the remedy, beyond the power of legislation? Not only because of the obligation of the contract implied by law, but even more palpably because the right so acquired becomes vested as property, and it stands protected by that clause of the Federal constitution which shields the property of every citizen from disturbance except by due process of law. By the settled law the lapse of the prescribed time not only bars the remedy, but, in the case of property, it vests a perfect title to the property, and at once comes under the protection guaranteed to the rights of property by the constitution.

But this result follows only from the assumption that the statute of limitations has run on unobstructed and unsuspended during the time prescribed by law. In the case before us, the slaves went into the possession of the donees in December, 1861, and January, 1862. The war was prevailing when the gifts were made. The question raised by these facts was reserved in the case of *Girdner v. Stephens*, as the court in that case held, that it could judicially know that the courts were not closed in the locality where the transaction occurred. We have determined the question at the present term by holding the general proposition, that as the bar operates upon the remedy, if, by the existence of civil war, the remedy is suspended by reason of the fact that the courts are not open, then and during such time as the courts are so closed, the statute would be suspended. But that whenever the court could know judicially

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that the military lines and occupation of the contending belligerents were fluctuating, and not fixed and permanent, then we could not judicially know whether the courts were open or not; and hence, that this was a proper question of fact for proof. The record shows that the intestate, Charles L. Yancy, was a resident in Carroll county, and that his two daughters, to whom the slaves were given, resided in Gibson county. We know judicially that these counties were under the military occupation of the Federal armies before the bar of the statute was complete, and that this occupation so continued to the close of the war. The suspension of the civil authorities is the legitimate result of military occupation. Hence, the presumption is that the civil courts were not open, and as there is nothing in the record that rebuts this presumption, we are bound by it; and, therefore, we hold that the bar of the statute was not so completed as to vest the title of the slaves in the daughters. It follows that they constituted part of the estate of the intestate, and the loss arising from their emancipation will fall on the whole estate.

The decree of the chancellor is reversed as to the advancements to the daughters, and affirmed as to the \$1,000 note advanced to N., and the cause remanded. The costs will be paid by the appellees.

FREEMAN, J., dissented.

CASES
OF THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

WRIGHT V. HOLBROOK.

(52 N. H. 120.)

Agency — liability of town committee for negligence of contractor.

Defendant was one of a town committee for the purpose of improving a pond to supply the town with water. It was found necessary to clear a strip of land on the shore of the pond, and the land was purchased by the town for the purpose. The committee contracted for the clearing of the strip with one N. at an agreed price. N., after preparation, set fire to the brush, &c., on the strip, and, through his alleged carelessness, the fire escaped and destroyed some of plaintiff's timber and fences. *Held*, that defendant was not liable for the negligence of N. by reason of any relation between him as committee and N. as contractor, N. having exclusive control of the clearing under the contract.

Quære: Would the town be liable as owner under the above circumstances? *Bush v. Steinman*, 1 Bos. & Pul. 404, overruled; *Stone v. Cheshire R. R. Co.*, 19 N. H. 427, questioned.

ACTION on case by Charles Wright against Daniel H. Holbrook for injury to plaintiff's wood, timber and fences, alleged to have

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been caused by fire escaping from land of town of Keene, which was rashly set and carelessly managed by defendant. The trial showed that defendant and others were a committee appointed by the town of Keene to improve Goose pond for use in supplying its citizens with water. To make the necessary improvements a strip of land along the margin would have to be cleared, and the town purchased it for that purpose. The committee let the contract for the clearing to one Nourse. He prepared the land for burning, and set fire to the brush heaps, etc., August 7, 1869, and the fire escaped to the plaintiff's land. There was a high wind blowing at the time, and plaintiff insisted that the fire was imprudently started and mismanaged by Nourse. There was evidence to show defendant's presence, with Nourse aiding him at the time, which defendant denied, but, irrespective of the fact, plaintiff contended for his liability by virtue of his relations to the contractor. The jury disagreed, and the questions were reserved for the whole court.

Mr. Cushing, for plaintiff, citing *Elder v. Bemis*, 2 Metc. 599; *Stone v. Cheshire R. R. Co.*, 19 N. H. 427; *Bush v. Steinman*, 1 Bos. & Pul. 404; *Stone v. Codman*, 15 Pick. 297; *Wiswall v. Brinson*, 10 Ired. 554; *Lowell v. B. & L. R. R. Co.*, 23 Pick. 24, and note; 18 C. L. & Eq. 445.

Wheeler & Faulkner, for defendant.

SARGENT, J. The case of *Bush v. Steinman*, 1 Bos. & Pul. 404, was decided in 1799, and was as follows, as stated in the head-note to the original opinion: "A, having a house by the road-side, contracted with B to repair it for a stipulated sum. B contracted with C to do the work; C with D to furnish the materials. The servant of D brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned. Held, that A was answerable for the damage sustained." Many cases in England followed the principle and adopted the doctrine of this case, though the facts in but few carried the application of the doctrine so far as in the original case.

These cases are cited and commented on in *Stone v. Cheshire R. R.*, 19 N. H. 427, as well as those cited as authority in *Bush v. Steinman*: *Heine v. Nichols*, 1 Salk. 289; *Jones v. Hart*, 2 id. 441; *Stone v. Cartwright*, 6 T. R. 411; *Littledale v. Lord Lonsdale*, 2 H. Black.

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267; *Laugher v. Pointer*, 5 Barn. & Cress. 347. In which *Bush v. Steinman* is doubted and qualified: *Randleson v. Murray*, 8 Ad. & E. 109; *Milligan v. Wedge*, 12 id. 737; *Allen v. Hayward*, 7 Ad. & E. (N. S.) 960; *Duncan v. Findlater*, 6 Clark & Fin. 894; *Quarman v. Burnett*, 6 M. & W. 499.

But the case of *Lowell v. The Boston & Lowell R. R.*, 23 Pick. 24, was the only case cited in this country as directly in point. This case in Pickering was decided in 1839, and the case of *Stone v. The Cheshire Railroad* in 1849. Upon examining the case in 23 Pick., it will be seen that there is no discussion of the principle involved, and no citation or examination of authorities, except the leading case of *Bush v. Steinman*.

But the subsequent cases in England have constantly modified, or qualified, or weakened the doctrine of the principal case, until it is finally considered as overruled in the courts of that country. *Knight v. Fox*, 5 Exch. 721; S. C., 1 L. & Eq. 477, is directly opposed to *Bush v. Steinman*, and also to *Lowell v. The Boston & Lowell R. R.*, 23 Pick., *supra*. But the American publisher appends a note to this case, in 1 L. & Eq. 480, in which he says: "The rule is well established that a master or principal is civilly liable for the negligence of his servant or agent in the course of his employment; but the later English authorities have denied the application of such rule where the relation is that of principal contractor and sub-contractor, and now seem to uniformly hold that such principal contractor is not responsible for the wrongful acts or negligent conduct of servants employed by such sub-contractor in the prosecution of the work; and the former cases of *Bush v. Steinman*, 1 Bos. & Pul. 404, and *Randleson v. Murray*, 8 Ad. & E. 109, have been denied to be law. See *Quarman v. Burnett*, 6 M. & W. 499; *Rapson v. Cubitt*, 9 id. 710; *Milligan v. Wedge*, 12 Ad. & E. 737; *Allen v. Hayward*, 7 Q. B. 960; *Reedie v. Northwestern R. R. Co.*, 4 Exch. 244. And this, although such sub-contractor was also at the same time the general servant of his employers, or although the principal contractor reserved the right to discharge the workmen employed by the sub-contractor, if dissatisfied therewith. On the other hand, it has been held in this country that a railroad corporation is liable for the negligence of workmen employed by an individual who had contracted to construct a certain portion of the railroad for a stipulated sum;" and cites *Lowell v. The Boston & Lowell Railroad*

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Corporation, 23 Pick. 24, and *The Mayor, etc., of New York v. Bailey*, 2 Denio, 433.

These cases, and especially the last, go to the extent of not only holding this defendant, whether he had any thing to do with setting this fire, or ordering it, or being present when it was set, but would carry us further, and make the town of Keene responsible as the first contracting party; and also upon the doctrine of some of the cases cited, that the owner of real estate is responsible for its being so used as that no injury be done to others. The last case cited tends particularly in that direction. In that case the city of New York was holden liable for damages caused to third persons by the negligent and unskillful construction of a dam on the Croton river, built pursuant to the act for supplying the city with pure water, where it appeared that the city owned the land on which the dam was built, though said dam was built under the superintendence of the water commissioners—officers appointed by the State, and not subject to the direction or control of the city in any respect—who let the work to certain contractors under a written agreement; neither, in that case, had the city any right to interfere in the appointment or removal of the engineers or workmen who were employed in the construction of the work, nor to withhold the payment of their wages out of the fund provided by law for such payment. It is there said, by WALWORTH, Chancellor, that the decision cannot be sustained upon the ground that the relation of principal and agent, or master and servant, existed between the city and the engineers who surveyed and the workmen who constructed the dam in question; but it is put upon the ground that the owner of real estate is responsible for the negligent acts of persons employed in making erections upon it for his benefit, though the relation of master and servant does not exist between such owner and the persons so employed, upon the doctrine of *Bush v. Steinman*.

By that authority the town of Keene would be made liable for the acts of the committee, and also of Nourse and of everybody else who might have any thing to do with the clearing or preparing the lot, or constructing the works, or building dams, or doing any thing upon this land which the town owned. But that would be carrying the doctrine too far for this case, for, though the city might be liable on that ground, this defendant could not be, as he did not own the land, nor was the work being done for his benefit,

but for the benefit of the town of Keene. If this defendant is to be held liable, it must therefore be upon the ground that Nourse was his agent or servant in doing the acts complained of, as this case cannot stand upon the doctrines of any of these cases.

But the holdings of the court in Massachusetts and New York have undergone a marked change since these cases were decided. In Massachusetts, the case of *Hillard v. Richardson*, 3 Gray, 349, was decided in 1855, where it was held that the owner of land who employs a carpenter for a specific price to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair. The plaintiff had relied in the argument upon *Stone v. Codman*, 15 Pick. 297, *Lowell v. Boston & Lowell Railroad*, 23 id. 24, and *Earle v. Hall*, 2 Metc. 353, as proving that the doctrine of *Bush v. Steinman* was the settled law of Massachusetts. THOMAS, J., in delivering the opinion of the court, first reviews the Massachusetts cases to show that they sustain no such position.

In speaking of *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24, he says: "The defendants had been authorized by their charter to construct a railroad from Boston to Lowell four rods wide through the whole length. They were authorized to cross turnpikes or other highways, with power to raise or lower such turnpikes or highways so that the railroad might, if necessary, pass conveniently over or under the same. Now it is plain that it is the corporation that are intrusted by the legislature with the execution of these public works, and they are bound in the construction of them to protect the public against danger. It is equally plain that they cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad, and under authority of the corporation vested in them by law for that purpose. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders, and that servant had the care and supervision of them. The accident occurred from the negligence of the servant of the railroad corporation, acting under their express orders. The case, then, of *Lowell v. Boston & Lowell Railroad* stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar

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The court might well say that the fact of Noonan's being a contractor for this section did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant, acting under their orders."

Judge THOMAS then examines the leading case of *Bush v. Steinman*, and the cases upon which it was supposed to stand, and concludes that this case does not stand well, upon authority or reason; and then examines the subsequent decisions in England, viz.: *Sly v. Edgerly*, 6 Esp. 6; *Mathews v. West London Water Works*, 3 Camp. 403; *Harris v. Baker*, 4 M. & S. 27; *Hall v. Smith*, 2 Bing. 156; *Randleson v. Murray*, 8 Ad. & E. 109; *Burgess v. Gray*, 1 C. B. 578; *Sadler v. Henlock*, 4 El. & Bl. 570; *Laugher v. Pointer*, 5 Barn. & C. 547; *Quarman v. Burnett*, 6 M. & W. 499; *Milligan v. Wedge*, 12 Ad. & E. 737; *Rapson v. Cubitt*, 9 M. & W. 710; *Allen v. Hayward*, 7 Ad. & E. (N. S.) 960; *Reedie & Hobbit v. London & North Western Railway*, 4 Exch. 244; *Knight v. Fox*, 5 id. 721; *Overton v. Freeman*, 11 C. B. 867; *Peachey v. Rowland*, 13 id. 182; *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767; *Leslie v. Pounds*, 4 Taunt. 649. Upon this examination he concludes that *Bush v. Steinman* is no longer law in England, and that if ever a case can be said to have been overruled, directly and indirectly, by reasoning and by authority, this has been.

He then says: "The suggestion is made, that whatever may be the result of the later cases in England, the doctrine of *Bush v. Steinman* has been affirmed in this country." He then examines *Bailey v. The Mayor, etc., of New York*, and places that upon the same ground with *Lowell v. Boston & Lowell Railroad*, *Blake v. Ferris*, 5 N. Y. 48, *Stevens v. Armstrong*, 6 id. 435, showing that they both reject the authority of *Bush v. Steinman*.

The cases of *Lesh v. Wabash Navigation Co.*, 14 Ill. 85, *Willard v. Newbury*, 22 Vt. 458, and *Batty v. Duxbury*, 24 id. 155, rest upon the same principles as *Lowell v. Boston & Lowell Railroad*; and our case of *Stone v. Cheshire Railroad* would stand well upon the same ground, without invoking the authority of *Bush v. Steinman*. The case of *Wiswall v. Brinson*, 10 Iredell, 554, is admitted to sustain the doctrine of *Bush v. Steinman*; but that was a divided judgment, RUFFIN, C. J., dissenting, while *DeForrest v. Wright*, 2 Mich. 368, is in direct conflict with the leading case, *Bush v. Steinman*.

In this case it does not appear that the defendant, or Nourse, or

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the town of Keene, were acting under any public authority, so as to bring the case within the principle stated for work done under public authority, such as railroads and canals, where public policy holds the corporation responsible, and will not permit it to escape by delegating their powers to another. But if it did, it would go too far for this case, as we have seen, and make the town of Keene, or the corporation, whatever it may be, liable, and not this defendant. If the object were to hold the owner of land for acts done upon the land for his benefit, that would tend to charge the town of Keene, and not this defendant; and we think that if the case stands only upon the facts that Nourse was a sub-contractor under the defendant with others, doing the work by the job, and being at liberty to do it in his own way, and use his own discretion and judgment in clearing the land, that he alone would be liable in this action. But if the plaintiff can prove that the defendant assisted, or directed, or was present aiding or abetting, then he would be liable; but if the only ground is that the defendant is liable for the negligence and carelessness of Nourse, by virtue of the relation between them, as committee of the town and sub-contractor, to clear the land by the job at a specified price, then we think he is not liable.

The English cases go so far as to ignore the distinction made by THOMAS, J., in cases of railroads and other corporations, and draw the line closely between that class of cases founded upon the relation of contractor and sub-contractor, and the class founded upon that of principal and agent, where the principal has control of the workmen, and can discharge them at pleasure. I think the tendency is, in this country, not to recognize the distinction between railroads and other corporations on one side, and individuals or private companies on the other, and to adopt the doctrine of the late English cases, which would overrule *Stone v. Cheshire Railroad*, 19 N. H., not only so far as it stands upon *Bush v. Steinman*, but also so far as it is sustained by the doctrine of *Hillard v. Richardson*, 3 Gray. The case of erecting, maintaining or suffering a nuisance upon one's real estate, stands upon its own ground; and there may be other cases or classes of cases that would be exceptional in their character.

But aside from these, the doctrine of principal and agent seems to be more and more recognized as the true and only foundation for the liability of one person for the acts or negligences of another.

Case discharged.

Hutchins v. Gerrish.

HUTCHINS V. GERRISH.

(88 N. H. 204.)

Evidence — foreign judgments.

Plaintiff offered in evidence a copy of a record of a judgment rendered in another state. The copy was not duly authenticated but the court admitted it and the plaintiff had a verdict. *Held*, that the verdict might stand and judgment be rendered thereon, upon the plaintiffs furnishing to the court a duly authenticated copy of the verdict.

TROVER by Alphens Hutchins against Samuel J. Gerrish for \$420, part United States treasury notes and part silver coin which plaintiff alleged defendant had stolen from him. Plaintiff called defendant as a witness, and subsequently, to impeach him, offered the record of the conviction of one George Johnson of larceny before the municipal court of Boston, Mass. The identity of the defendant with said George Johnson was established by the testimony of Hon. Jacob Benton, who had visited the institution where said Johnson was serving out his sentence under said conviction, and inquired for him and was shown the defendant. The record was not authenticated otherwise than by the seal of said municipal court and a certificate purporting to be that of the clerk thereof. There was no proof that the certificate of the clerk was in his handwriting, neither did the judge of the court certify that the clerk's certificate was in due form. The evidence of identity and the record were admitted under defendant's exception. The court charged that the record was not to be considered evidence by the jury unless the jury should find the identity of the defendant and George Johnson to be the same, and then if they should so find, that it only affected his credit as a witness, and must not be regarded as evidence that he stole plaintiff's money. Verdict by jury for plaintiff, and motion to set aside for error in said rulings. Question reserved.

Ray & Drew and Mr. Bingham, for plaintiff.

Mr. Whidden and Wm. Heywood, for defendant.

SARGENT, J. The constitution of the United States, art. 4, § 1, provides that congress may, by general laws, prescribe the manner in which the acts, records and proceedings in the several States shall be proved, and the effect thereof.

Congress has enacted (United States Statutes, May 29, 1790) that "the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the authentication is in due form." Brightly's Dig. 265 ; 1 Greenl. Ev., § 504.

This record was not proved in that way, for although it had what purported to be a seal and an attestation of the clerk, yet there was wanting the certificate of the judge, chief justice or presiding magistrate that the authentication was in due form.

It is not enough if the judge certify that the person who attests the copy is the clerk of the court, and that the signature is in his handwriting (*Drummond v. Magruder*, 9 Cranch, 122 ; *Craig v. Brown*, 1 Pet. C. C. 352) ; but it must state specifically that the attestation of the clerk is in due form. And the certificate of the presiding judge, being the evidence prescribed by law that this form has been observed, is at once indispensable and conclusive. *Ferguson v. Harwood*, 7 Cranch, 408 ; *Tooker v. Thompson*, 3 McLean, 93.

But it may be said that this provision of the law of congress does not refer to this kind of a record ; that the records of justices of the peace and of courts of limited jurisdiction do not come within this rule, and that is so to a certain extent. *Warren v. Flagg*, 2 Pick. 448 ; *Robinson v. Prescott*, 4 N. H. 450 ; *Mahurin v. Bickford*, 6 id. 567 ; *Thomas v. Robinson*, 3 Wend. 267. In many of the cases the question is as to the effect of the judgment when proved, rather than as to the form of the proof. But the question here raised is fully discussed in *Taylor v. Barron*, 30 N. H. 78-95, where it is held that all records and judicial proceedings of courts are included in the terms and meaning of the act of congress, when the nature of the tribunal would admit of the required proof. A seal was not absolutely necessary. If there was one, it must be used ; if there was none, that fact must appear in the clerk's certificate.

But there must be a clerk and a chief justice, a judge or a presid-

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ing magistrate. Now, in the case before us, there was a seal and a clerk — the seal and the clerk of a municipal court of Massachusetts. We can hardly understand how there can be a court with a clerk and a seal, which shall not have a judge or presiding magistrate; and if it had either, then the records could be authenticated as required by act of congress, and should have been; and without the certificate of the judge or presiding magistrate, the rest is all of no avail.

The defendant cannot complain of the ruling as to the effect of the judgment after it was introduced, that it should be only *prima facie* and not conclusive evidence of his conviction; but what he has reason to complain of is, that the record was introduced at all without proper authentication.

But, suppose it were held that the record or proceedings of this court were not such as to be proved in this way: that does not help the plaintiff, but is rather against him. If it is not such a record as may thus be authenticated under the act of congress, it must stand upon the ground of a record from a foreign State or government (*Mahurin v. Bickford*, 6 N. H. 567), where the proof is still more difficult. The form of the proof in these cases is stated in *Mahurin v. Bickford*, *supra*, and in *Church v. Hubbard*, 2 Cranch, 238, by MARSHALL, C. J., as being: "1. By an exemplification under the great seal; 2. By a copy, proved to be a true copy; 3. By the certificate of an officer, authorized by law, which certificate must itself be properly authenticated." Now, it will be readily seen that the requirements of neither one of these three modes of proof were answered in this case.

The seal of a municipal court in Massachusetts does not prove itself in another State, nor is the clerk of such court an officer known in any other State as a proper certifying officer. The rule for proving such judgments, "by a copy proved to be a true copy," is stated in 1 Greenl. Ev., § 508. If a witness had been produced before the court at this trial, who had compared this copy with the original record in the proper court, or place for the records of the court, that would have been sufficient. But Mr. Greenleaf says, that in such case it should appear that "the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept; and this cannot be shown by any light reflected from the record itself, which may have been improperly

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placed where it was found. Nothing can be borrowed *ex visceribus judicii*, until the original is proved to have come from the proper court."

But there is no claim or pretense, in this case, that there was not a judge or presiding magistrate of this municipal court in Massachusetts, who could have made the certificate which the act of congress requires, viz., that the authentication was in due form, if such was the fact. The record was therefore not so authenticated as to make it competent evidence for any purpose.

The record, if properly authenticated, might have been properly used under our statute (ch. 38, § 1, of the Laws of 1871), which is general, authorizing the record of conviction to be used in all cases to affect the credit of a witness; and, by ch. 209, § 15, Gen. Stats., it is provided that when one uses the opposite party as a witness, whether the nominal or real party, "he is not thereby to be precluded from cross-examining, contradicting or impeaching him." This is one way of impeaching a witness, and would be entirely proper if the record had been properly authenticated.

We think the evidence of identification was sufficient. Benton states that he knew him and conversed with him when he first saw him in the house of correction: that is, the form of expression, which implies necessarily that he had known him before; and, so far as the case shows, it is not certain which was his true name. But there was clearly such evidence as that the jury may properly have found the two names to belong to one person. *Dickinson v. Lovell*, 35 N. H. 9, 17, 18.

The question then arises, whether this defect in the proof is necessarily a cause for setting aside this verdict; or, may this additional certificate now be furnished, so as to make the evidence just what it should have been in the first place? and, when the court can see that this defect is supplied and the evidence made fully competent, may judgment be ordered on the verdict?

The evidence which was wanting was evidence addressed to the court and not to the jury. The evidence went to the jury as though the record were competent; and they have passed upon the facts as though the record were properly authenticated. Now, if this record was, in fact, a proper record, and the certificate of the judge or the presiding magistrate of said court can now be obtained to that identical copy, that the authentication is in due form, etc., in a way to comply fully with the requirements of the law of con-

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gress, what occasion is there to go through the form of another trial, and submit precisely the same evidence to the jury as before, with a view to a settlement of the facts in this case? We see none.

In *Stevenson v. Mudgett*, 10 N. H. 338, 342, it was held that the proof might be furnished to the court, after verdict, of the delivery of the discharge to the witness before he testified, and that, upon such proof being made to the court, judgment might be rendered on the verdict.

So, in *Whittier v. Varney*, 10 N. H. 304, it was held that the return of an officer upon an extent, which was introduced in evidence, may be amended after verdict without setting aside the verdict, as the sufficiency of the return was for the court and not for the jury, especially when the amendments are not of a nature to affect the finding of the jury. The principle of that case fully covers this case. *Rand v. Dodge*, 17 N. H. 343, 355. *Jaquith v. Putney*, 48 id. 138, is a strong case in point, as also *Janvrin v. Fogg*, 49 id. 340, and cases on page 357.

The order in this case will therefore be, that if, at the next trial term in the southern judicial district of Coos county, the plaintiff supplies to the copy of the record, which was used on the trial of this cause, the certificate of the judge, chief justice or presiding magistrate of the said municipal court, so that this court can see that the copy is made fully competent as evidence, under the act of congress before referred to, then judgment will be rendered on the verdict; otherwise,

Verdict set aside.

BURLLEIGH, appellant, v. OLOUGH.

(32 N. H. 287.)

Estate. Will—life estate—remainder—power.

H. bequeathed to his wife, if living at his death, the whole of his estate for use and disposal for life, and "what is remaining at her decease undisposed of by her," to D. and his heirs and assigns forever. On the death of H., his widow (who had also property, real and personal, in her own right) took possession of his estate under said will. The widow then made her will, in which, after some specific devises, she bequeathed to B. "all the rest and residue of (her) estate, real, personal and mixed, wherever found and how-

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ever situated." *Held*, (1) That by the first will, the widow took an estate for life with a power to defeat the remainder, and that D. took, not an executory devise, but a vested remainder. (2) That the second will did not operate to defeat the remainder given to D. by the first.

APPEAL by Benaiah P. Burleigh and wife against David O. Clough, executor, etc., of the will of Hannah Hersey, from a decree of the probate judge of Belknap county. Case submitted on the following agreed facts.

Jacob Hersey, of Sanbornton, made his last will February 21, 1867, which contained a provision as follows: "I do give, devise and bequeath unto my wife Hannah Hersey, if she is living at the time of my decease, all my estate, both personal and real or mixed, wherever the same may be found, to her, the said Hannah Hersey, to her use and disposal during her natural life; and what is remaining at her decease, undisposed of by her, I give, devise and bequeath unto Joshua E. Dennis and his heirs and assigns forever. And if my said wife, Hannah Hersey, is not living at the time of my decease, I do give, devise and bequeath all of said estate unto the said Joshua E. Dennis, to him and his heirs and assigns forever." On June 18, 1867, this will was admitted to probate, the testator having died sometime previously. Hannah Hersey took possession of her husband's estate under this will, which amounted to \$2,543.64. November 20, 1867, Hannah Hersey made her will, which, after certain special bequests, contained the following: "I give, bequeath and devise to Benaiah P. Burleigh and his wife, Mary Burleigh, all the rest and residue of my estate, real, personal and mixed, wherever found and however situated, while they both live, and in the event of the death of one of them, to descend to the survivor, his or her (as the case may be) heirs and assigns forever." Hannah Hersey died, and her will was probated, with defendant as executor, in June, 1869. Hannah Hersey had an estate in her own right when her husband made his will. The defendant was charged with \$1,552.97 as her estate under the decree of the court as executor of Hannah Hersey. On final settlement, the executor claimed credit for the following items: "Delivered to Joshua E. Dennis, executor of J. Hersey's estate, the hay cut on J. Hersey's land, after Mrs. H. Hersey's death, \$218;" "also a lot of crockery, which was of J. Hersey's estate, \$5;" "paid Joshua E. Dennis, executor of J. Hersey's will, the amount of receipt for cash delivered by him as executor to Hannah Hersey, as per said receipt, dated May 20, 1867, \$262.96."

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These items were correct and undisputed in fact. They were credited and allowed defendant by the probate judge, from which allowance said Burleigh and wife appealed. The money embraced in the receipt of May 20, 1867, was not kept separate by Hannah Hersey from her other money not derived from her husband's estate. When Jacob Hersey made his will, February 21, 1867, Hannah Hersey also made a will, which was revoked by her after will, of November 20, 1867. Counsel agreed that her first will and the accounts of Dennis and Clough might be referred to on the argument, if deemed material by the court.

Pike & Blodgett and A. & F. A. Fowler, for appellants.

Mr. Perley, for appellee.

FOSTER, J. The first question naturally presented by this case is, what kind of an interest or estate did Hannah Hersey take under her husband's will? Was it a fee simple, or an estate for life.

In considering this question, we resort, in the first instance, to the application of those elementary rules of construction which provide that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible; and that the intention of the testator is the prevailing consideration and the supreme rule of interpretation. 1 Redf. Wills, 431-433.

The words of the devise are plain and distinct: "I give," etc., "all my estate, both personal and real, or mixed" * * * "to her, the said Hannah Hersey, to her use and disposal during her natural life;" "and what is remaining at her decease, undisposed of by her, I give, devise and bequeath unto Joshua E. Dennis and his heirs and assigns forever."

If the will had given the estate to Mrs. Hersey and her heirs, or to Mrs. Hersey, generally, without words of limitation, she would have taken, by the operative words of the will, an estate in fee; and that estate would not have been reduced below an estate in fee by the added power of disposal, because such a construction would be manifestly repugnant to the estate in fee already granted. The expression of the added power would be mere surplusage, since every estate in fee involves an absolute power of disposal of the whole.

But here the estate devised to Mrs. Hersey is expressly limited to an estate for life, with remainder in fee to Dennis; and we have no

difficulty in reaching the conclusion that the intention of the testator was that she should take only an estate for life, with a power to defeat the remainder over.

The testator has used apt and explicit words of limitation to express this intention, which, to our minds, is as clear as that, by the use of equally apt and express words, he intended to give to the remainder-man an estate in fee. If he had intended to give his wife an estate in fee, he would have expressed that intention by the use of such terms as he employed in the devise to Dennis, which is of the remainder to him and his heirs and assigns forever.

The question then arises, whether this intention is to be controlled by any superior rule of law ; for an intention will not avail to create an illegal or impossible estate. *Smith v. Bell*, 6 Peters, 68.

"There is an evident difference between a power and an absolute right of property," said Sir Wm. GRANT, M. R., in *Holmes v. Coghill*, 7 Ves. 506. See 4 Kent's Com. 335 ; 2 Washb. R. P. *325 ; 3 Washb. R. P. *303, *315, *334 ; Williams on Real Property, 249.

A power, when conferred by will, is a bare authority derived from the will. It is not an estate, and has none of the elements of an estate. It is defined by Bouvier as "an authority enabling a person, through the medium of the statute of uses, to dispose of an interest in real property, vested either in himself or in another person." See Williams's R. P. 245 ; Co. Litt. 271 *b*, Butler's note, 231, § 3, pl. 4. "A power is an authority enabling one person to dispose of the interest which is vested in another." BULLER, J., in *Goodill v. Brigham*, 1 Bos. & Pul. 197. "A general power of disposition, existing as a power, does not imply ownership ; in fact, the existence of such a power, as a technical power, excludes the idea of an absolute fee simple in the party who possesses the power." PARKER, C. J., in *Eaton v. Straw*, 18 N. H. 331.

The learned chief justice, in the same case, although he does not find it necessary, for the purposes of its decision, to controvert the opinion expressed by the appellants in the present case, that there can be no limitation over after the gift of a general power of disposition of an estate, remarks that such a proposition "is certainly not a necessary result from any legal principle;" and he adds, — "there is nothing incongruous in holding that the gift of such a power, superadded to language which might otherwise be construed as conveying an absolute fee, tends to limit the preceding phraseology, so that it is not to be construed as creating such an estate.

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The appellants contend, in argument, that this will must be construed as devising a fee, because the power annexed to the devise was general, and not a mere power of appointment in favor of specified persons. She had, they say, an unqualified right to dispose of the whole property,—she was a free moral agent; and, because she could do with the property all that an owner in fee could, simply by executing the power, therefore she must be the owner in fee; and, by further consequence, the limitation over to Dennis is by way of executory devise, with which the right of disposition, given to Mrs. Hersey, is incompatible.

It is quite obvious that such argument is the result of confounding the distinction between property and power. The estate given Mrs. Hersey is a property; the power of disposal, a mere authority, which Mrs. Hersey may exercise or not, in her discretion.

If B, having a general power annexed to the life estate which he has derived from A, executes that power by a sale of the property to C, the title of C is derived, not from B, who executes the power, but from A, who gave it.

“The appointer,” says Mr. Washburn, “is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or, as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee, as his assignee.” 2 Washb. R. P. *320; 1 Sug. Pow. (ed. 1856) 242; 2 Sug. Pow. 22; *Doolittle v. Lewis*, 7 Johns. Ch. 45.

This distinction between property and power being kept within view, it becomes unnecessary to controvert the proposition, supported, doubtless, by the authorities so abundantly collected by the learned counsel for the appellants, and so explicitly declared by Chancellor KENT in *Jackson v. Robins*, 16 Johns. 589, that “it is a clear and well-settled rule of law, that an executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which, it is limited, or by any mode of conveyance; that where conditions are repugnant to the estate to which they are annexed, they are void (2 Redf. Wills, 659); that a valid executory devise cannot subsist under an absolute power of disposition in the first taker (4 Kent’s Com. 270); from all which the appellants argue that the limitation over to Dennis, being by way of executory devise, is void;—for we are led to the inevitable conclusion that the estate limited to Dennis was not an executory devise, but a

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vested remainder; and the reasons which apply to the destruction of an executory devise by joining it to a power of disposal, have no application to a remainder, limited upon an estate for life.

We cannot so well express the definition and character of an executory devise as by adopting the language of the learned counsel for the appellee, in argument: "An executory devise is a future interest, such as the rules of law do not permit to be created in conveyances, but allow in the case of wills, like an interest given after an estate in fee simple, or to arise *in futuro*, without a particular estate to support it. *Scatterwood v. Edge*, 1 Salk. 229. They came into use after the Statute of Wills, 32 Hen. 8, and were allowed out of indulgence to testators, that they might, without the intervention of trustees to preserve remainders, establish future interests in strict settlement beyond the reach of those who had the prior estates — 4 Kent, 260; and such being the object, it was held to be essential to a good executory devise that the first takers should have *no power* to dispose of the interest devised. If, therefore, the first taker had the power by grant from the testator to dispose of the executory devise, the power defeated the whole object of such devises, and was held to make them inoperative though the power was not executed. Every good executory devise, as the rule would seem to be established in England, is 'inalienable, though all mankind join in the conveyance.' *Scatterwood v. Edge*, 1 Salk. 229; 4 Kent, 260; 6 Cruise's D. 461, 465. For this reason, a power of disposition has been held to be inconsistent with the nature of such an interest. It is against this rule, even in the case of an executory devise, that PARKER, C. J., objects, in *Eaton v. Straw*, 18 N. H. 320."

The distinction between an executory devise and a vested remainder is elementary. An executory devise is such a disposition of lands by will, that thereby no estate vests at the devisor's death, but only on some future contingency. It needs no particular estate to support it. An estate in remainder is one limited to take effect and be enjoyed after another is determined. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole. See *Jackson v. Robins*, 16 Johns. 537, 588; *Downing v. Wherrin*, 19 N. H. 9, 85.

Another elementary principle applies in cases where it may be doubtful whether an estate is an executory devise or a remainder, namely: that a gift shall not be deemed an executory devise if it

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can take effect as a remainder; and that no remainder shall be considered contingent, if it may, consistently with intention, be deemed vested. *Blanchard v. Blanchard*, 1 Allen, 225; *Doe v. Perryn*, 3 Term, 484—489, *note*; 4 Kent's Com. 202; and see *Banister v. Henderson*, Quincy, Ms. 120.

By the terms of the will, Mrs. Hersey took two things—an estate for life, and a power of disposal of the estate; and it is contended that the grant of this power enlarges the estate for life to an estate in fee—that the power becomes merged in the estate.

Now, as an estate in fee, involving the right of disposal, cannot be reduced to an estate for life, by implication, from the addition of words conferring a power of disposal, so a separate and distinct grant of a power of disposal, although it may divest the estate in remainder, cannot enlarge an estate for life, expressly declared and limited, to a fee, because the power of disposition is not inconsistent with nor repugnant to an estate for life, as we shall presently see. It is not repugnant, because, if no power of disposal had been conferred by the will, she would have still taken an estate for life, as she now takes both an estate for life and an added power of disposal.

And by this construction, the whole and every portion of the will becomes effectual, according to the manifest intention of the testator, which was, as we have no doubt, to give to his widow an estate for life at all events; and, more than that, a power of disposition of so much of the property, even to the extent of the whole, as her needs, her comfort, or her gratification should demand; and that the remainder, if any, should go to Dennis.

It will be found, upon examination, that a majority of the authorities to which we are referred by the appellants, which apparently go to the extent of holding that a power of disposition, annexed to an estate for life, enlarges the life estate to a fee, are cases in which the estate for life is not conferred by express terms, but arises from implication—such implication being deemed essential, in the particular case, in order to give effect to the intention of the testator, as manifested by the whole scope of the devise. Such is particularly the case in *Ramsdell v. Ramsdell*, 21 Mo. 288; *Pickering v. Langdon*, 22 id. 213; *Burbank v. Whitney*, 24 id. 146; and *White v. White, Ex'r*, 21 Vt. 250. In neither of these cases is the estate for life granted by express terms of limitation. And in other cases cited to the same point, such as *Harris v. Knapp*, 21

Pick. 412; *Hall v. Marsh*, 100 Mass. 468; *Dodge v. Moore*, 100 id. 335, and *Stroud v. Morrow*, 7 Jones (N. C.), 463, the general expression of an opinion by the court, that those cases exhibited an estate in fee in the first taker, must be regarded as *obiter dictum*, since the real question involved was, not as to the character of the estate created by the devise, but, in the former of these cases, whether the devisee in fact, under the terms of the will, had a power of disposition — and in the others, what was the extent of that power?

In none of them, as I understand it, was the question raised as to the effect of the power upon the particular estate devised.

These cases, when compared with others, to some of which we shall presently refer, serve to mark this plain distinction, that where general words, implying an estate for life, if limited to such an estate, would manifestly defeat the intention of the testator, the intention shall control and enlarge the estate to a fee; but if the testator in express terms give an estate for life, the intention is manifest and beyond doubt; and in such case an added power of disposition cannot enlarge the estate contrary to the testator's intention.

Thus, in *Popham v. Banfield*, Salk. 236, it is holden, that where a particular estate is expressly devised, a contrary intent is not to be implied by subsequent words; or, as the same case is expressed in 2 Vern. 449, "an express estate for life cannot be enlarged by an implication, but may by express words;" and, as again expressed in the statement of the same case, in 1 P. Wms. 54, "no estate raised by implication in a will can destroy an express estate."

In *Thomlinson v. Dighton*, Salk. 239, it is holden, that "devise to A for life, then to be at her disposal to any of her children, gives an estate for life, with power to dispose of the fee." In the argument for the defendant in the same case as reported (1 P. Wms. 149), it is said: "There are two cases that are express authorities that the wife in the principal case has but an estate for life, with a power to dispose of the fee; and these two cases do make this very difference, viz., where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where lands are devised to one expressly for life, and afterward to be at the devisee's disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee; for that (as it is said) words of implication shall not merge or destroy an express estate for life." The cases referred to

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are *Anonymous*, 3 Leon. 71, and *Liefe v. Saltingstone*, 1 Mod. 189. In accordance with these views was the opinion of the court (1 P. Wms. 171).

In the case above referred to, from 3 Leon. 71, A, seized of lands in fee, devised them to his wife for life, and after her decease to give them to whom she would. The court said: "A gave the lands expressly to his wife for life, and therefore she should not have, by implication, any further estate. But if an express estate had not been appointed to the wife by the other words, the estate in fee would have passed." See, to the same effect, *Robinson v. Dugate*, 2 Vern. 181; *Nannock v. Horton*, 7 Ves. 398; *Holmes v. Coghill*, id. 505; S. C., 12 id. 206.

Surman v. Surman, 5 Madd. Ch. 123, was a "bequest of household goods, etc., after payment of debts, to the testator's wife for life or widowhood, with power to her to sell the same as she should think proper, for her own benefit and the maintenance of testator's nephew and daughter-in-law during their minorities, with a bequest over upon the death or second marriage of the wife of the same, or so much as should then remain, to such nephew and daughter-in-law." *Held*, that "the widow was entitled to the residue (that is, after payment of debts) for her life or widowhood, with a power to apply any part of the capital for her own benefit and the proper maintenance of the nephew and daughter-in-law during their minorities; and that, on the death or marriage of the widow, the remainder of the capital unapplied was well limited over."

This case distinctly shows that the uncertainty, whether there will be any remainder, does not vitiate the limitation over, and that the power does not enlarge the estate for life to a fee.

And see *Doe v. Martin*, 4 D. & E. 39, at pp. 64, 65, where Lord KENYON quotes Lord HARDWICKE as saying (in *Cunningham v. Moody*, 1 Ves. 174), that the effect of a power of appointment, added to an estate for life, "is, that the fee which was vested was thereby subject to be divested, if the whole were appointed."

And in *Reith v. Seymour*, 4 Russ. 263, it was holden, that a gift of personal estate to the wife for life, with a direction that, after her death, one moiety thereof should be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment.

If we turn now to the American authorities, we shall find them numerous and conclusive to the effect, that where the estate for life

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is devised by express terms, a power of disposal of the fee, whether general or special, will not enlarge the estate. In *Jackson v. Robins*, 16 Johns. 537, at p. 588, Chancellor KENT says: "We may lay it down as an incontrovertible rule, that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life *only* by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases."

In the Virginia court of appeals this matter is considered at great length, and presented with much force by TUCKER, president, in *Burwell's Executors v. Anderson, adm'r*, 3 Leigh, 348, particularly at pp. 356-358, where it is said "a devise to A, with power to dispose at pleasure, is considered as conveying *property*, not as conferring *power*; for the words of power will not be permitted to take away what, without them, is expressly given. 2 Prest. on Est. 81, 82; 13 Ves. 453. But where there is an express and inconsistent estate for life given, the construction of the instrument is altogether different; for the express estate for life negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest. This appears to me to be very clearly established by the cases that were cited at the bar, which further lay it down, that where an *interest*, and not a mere *power*, is conferred, the absolute property is vested, without any act on the part of the legatee; but where a power only is given, that power must be executed, or it will fail."

Not to multiply quotations, the general principle established by the foregoing cases, and the manifest distinction between property and power, will be found laid down as the law in *Flintham's Appeal*, 11 S. & R. 18; *Second Pres. Church v. Disbrow*, 52 Penn. St. 219; *Haralson v. Redd*, 15 Geo. 151; *Cook v. Walker*, 15 id. 457, 463; *Morris v. Phaler*, 1 Watts, 390; *Rubey v. Barnett*, 12 Mo. 3; *Pulliam v. Byrd*, 2 Stroß. Eq. 134; *Ward v. Amory*, 1 Curtis' C. C. 419, and numerous other cases.

Particular reference, however, should be made to the case of *Denson v. Mitchell et ux.*, 26 Ala. 360, which overrules the case *Flintham*

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v. Davis, 18 id. 132, cited by the appellants, if that case is to be regarded as supporting their view of the matter.

In *Denson v. Mitchell et ux.*, it is said that "an express bequest of an estate for life negatives the intention to give the absolute property, and converts a superadded right of disposition into a mere power."

These views seem to be fully indorsed by the text writers; — thus, Kent says (4 Com. 520, 521) — "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." See, also, 2 Washb. R. P. *371; Greenleaf's note, 6 Cruise, 208, Devise, ch. 11, § 6.

In our own State the decision seems, to be not in conflict with the doctrines we have stated. Thus, in *Eaton v. Straw*, 18 N. H. 320, the head-note is, — "A general power of disposition, existing as a power, does not imply ownership, but excludes the idea of an absolute fee simple in the party who possesses the power."

This case is cited by the appellants as an authority to the point that there can be no limitation over after the gift of a general power of disposition, which is undoubtedly true if the distinction be entirely disregarded which we have found to be so marked and plain, and the general power of disposition be applied to a general devise, without limitation of a life estate. That was the case of an executory devise, and the precise point before us did not arise, but the doctrine of the case is expressed in the head-note above quoted.

In *French v. Hatch*, 28 N. H. 331, at page 350, Mr. Chief Justice GILCHRIST expresses, in the plainest terms, the true rule, as follows: "Where there is a devise for life, in express terms, a power of disposition does not enlarge it to a fee. But where to a general devise, without any specification of the quality of interest, an absolute power of disposition is annexed, the devisee takes a fee. This distinction is carefully marked and settled in the case of *Jackson v. Robins*, 16 Johns. 558, and cases cited by KENT, Ch." This case, which was a gift by will of both personal and real property expressly limited for life, necessarily involved the consideration of the distinction between a general devise and an express limitation for life. Upon this branch of the case, therefore, it is precisely in

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point, and seems to settle the law of this State in accordance with the doctrine declared by Chancellor KENT, in *Jackson v. Robins*.

And in the earlier case of *Leavitt v. Wooster*, 14 N. H. 551, although the point was not presented in such manner as to require adjudication, the principle seems clearly recognized by GILCHRIST, J., in the following language: "The quantity of estate devised to her is not a matter of doubt, as she is expressly limited to an estate for life. There are numerous cases which hold that where a devise contains no words of limitation, and the payment of debts and legacies is made a personal charge upon the devisee, he takes a fee by implication, unless there are other words in the will which limit the quantum of interest. But that question does not arise in this case, as the estate of the devisee is particularly described."

In *Dennett v. Dennett*, 40 N. H. 498, BELL, C. J., remarks, concerning the case then before the court, — "The terms of this will, 'all the residue of my estate,' if standing uncontrolled by other expressions, would pass a fee [citing, among other cases, *Leavitt v. Wooster*.] They cannot be so construed here, because the devises following control the sense, and show that a life estate was intended to be given him."

The cases already cited from our own reports, together with *Weeks v. Weeks*, 5 N. H. 326; *Ladd v. Harvey*, 21 id. 514; *Yeaton v. Roberts*, 28 id. 459, and *Healey v. Toppan*, 45 id. 243, show that there is no distinction between real and personal property with regard to the limitation of a remainder after an estate for life, except, perhaps, in the case where the use necessarily involves the destruction of the property.

RICHARDSON, C. J., in *Weeks v. Weeks*, 5 N. H. 326, remarks, — "In ancient times there could be no limitation over of a chattel after a gift for life, but such a gift carried the absolute property. Afterward a distinction was made between the use and the property. The use might be given to one for life, and then the property afterward to another. But this distinction is now disregarded. The law admits of a limitation over by will, of a chattel interest, after a life estate in the same." To the same effect is *Ladd v. Harvey* and *Yeaton v. Roberts*, before cited.

Many of the English cases, before referred to in this connection, were bequests of personal property.

Smith v. Bell, 6 Pet. 68, is a very important case in support of the general proposition that a power of disposition does not enlarge

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an express estate for life. It would be interesting and instructive to quote lengthy passages from the luminous opinion of Chief Justice MARSHALL, in that case, but we forbear, — commending the case to the attention of the lawyer and student, simply repeating the language of that celebrated jurist, that “the rule, that a remainder may be limited after a life estate in personal property, is as well settled as any other principle of our law.”

Having determined that Mrs. Hersey took by her husband's will a life estate with a power of disposal, and Dennis a vested remainder, subject to be divested by the due execution of the power, the next question presented is, was the power legally executed by Mrs. Hersey's will?

The property devised to Mrs. Hersey by her husband's will consisted of real estate, returned in the inventory of his estate at \$1,365, and personal estate returned at \$1,178.64, making \$2,543.64. In addition to this, she had, in her own right, at the time of her death, real estate returned in the inventory of her estate at \$738, and personal estate returned at \$814.97, making \$1,552.97.

By her last will, she gave certain special bequests, the character and value of which are not indicated by the case, and then declared as follows: “I give, bequeath, and devise to Benaiah P. Burleigh, and his wife, Mary Burleigh, all the rest and residue of my estate, real, personal and mixed, wherever found and however situated, while they both live; and, in the event of the death of one of them, to descend to the survivor, his or her (as the case may be) heirs and assigns forever.”

A preliminary question is suggested, namely, Did Jacob Hersey, by his will, give to his wife a power of disposition by will of the estate devised to her? The terms of the devise in Jacob Hersey's will are, “to her, the said Hannah Hersey, to her use and disposal *during her natural life*; and what is remaining at her decease, undisposed of by her, I give, devise and bequeath unto Joshua E. Dennis, and his heirs and assigns forever.”

It is suggested by the appellee, in argument, that “Hersey and his wife were two childless people, having each separate property, not very unequal in amount; that, in addition to her own property, which might well be considered of itself adequate to her support, he gave her the use of all his property for her life, with authority to dispose of such part of it as she might need or desire, leaving what might be remaining at her decease to Dennis, to whom he gave

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all his property, in case he survived his wife; that giving her the power to apply to her own use such part of the property as she might choose during her life would abundantly provide for her comfort and independence, without intrusting to her the power to give away by will what remained at her decease, and so defeat the remainder limited to Dennis, and would fully answer all the object which we can suppose her husband had in the provisions made for her;" that the testator intended a substantial benefit to Dennis, and did not intend that any thing of his should go by descent to the heirs of his wife, nor that any will of hers should take from Dennis what was remaining at her decease, and give it to her devisee or legatee.

The construction of his will, like hers, is to be governed by the intention of the maker, if it can be ascertained; and, supposing those circumstances alluded to to exist (which we do not understand to be controverted), they must be regarded as quite material, as affecting the question of intention.

And, in connection with the phraseology of his will, they suggest to our minds very serious doubts whether Jacob Hersey intended to give to his wife a power of disposition by will.

We do not, however, find it necessary to decide that such was not his intention.

Recurring, then, to the main question upon this branch of the case, Was the power of disposal executed by force of Mrs. Hersey's will?

The will disposes of her estate, but makes no mention of the power, nor of the estate which was subject to the power.

The rule must be regarded as settled, by doctrine and authority of very ancient date, and of almost uniform application, that where a power is given which may be exercised by a will, it will not be executed unless there is a reference in the will to the power, or to the subject of it, or unless the will would be inoperative without the aid of the power, and the intention to execute it became clear and manifest. 4 Kent's Com. 334; 1 Jarman on Wills, 628, note.

In *Lovell v. Knight*, 3 Sim. 275, SHADWELL, V. C., said: "I apprehend it to be *perfectly settled* that whenever a will is couched in such terms as that, upon the face of it, it appears to express an intention to pass the general property which may belong to the party making the will, such a will shall not be deemed an execution of the power with regard to any specific property."

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This remark was applied to the case where a married woman, having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gave to her husband the whole of her property, both real and personal, and whatsoever she might possess at her decease. It was held that this was not an execution of the power.

This case is expressly affirmed in *Lempriere v. Valpy*, 5 Sim. 108, where the V. C., at page 121, adverts to what he calls the *known rule* laid down in *Standen v. Standen*, 2 Ves. Jr. 589; *Standen v. McNab*, 6 Bro. P. C. 193 (2d ed.); *Bennett v. Aburrow*, 8 Ves. 609; *Jones v. Tucker*, 2 Mer. 533, and *Jones v. Curry*, 1 Swanst. 66. In *Standen v. Standen*, *ante*, the Lord Chancellor (LOUGHBOROUGH) declares the rule to be as expressed in *Sir Edward Clere's Case*, 6 Co. 17, *l*, that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition.

In *Jones v. Curry*, *ante*, the M. R., in giving judgment, said: "This will contains no words which will be without operation, unless referred to the power; on the contrary, the testatrix uses terms of generality — 'all my estate and effects of whatever denomination.' That clause would embrace all her real and personal property, but would it go beyond that?" And in *Webb v. Honnor*, 1 Jack. & Walk. 352, the M. R. said: "In this instrument there is nothing to show that the testator meant to dispose of any thing but his own property. Every part of it is satisfied by giving all that he was possessed of."

The only exception to the requirement of a reference to the power or the subject-matter of it, in order to the execution of the power, evidently is the fact that the will, in the given case, must be wholly inoperative without the aid of the power. "A general roving description of property in a will is not sufficient" to execute a power, said the V. C. in *Rooke v. Rooke*, 2 Drew & Smale, 38, 44. "If you can find evidence of the testator's intention to dispose of the property which is the subject of the power, then the court will give effect to that intention."

BEST, C. J., in *Doe v. Roake*, 2 Bing. 497, 504, expresses the doctrine and the rule thus: "It has long been settled that an express declaration of the intent to execute a power is not necessary; on the other hand, no terms, however comprehensive, although sufficient to pass every species of property, freehold and copyhold, real and

personal, will execute a power, unless they demonstrate that the testator had the power in his contemplation, and intended by his will to execute it." See the remarks of Lord Chief Justice HOBART, in the *Commendam case*, Hob. Rep. 159, 160, and for a review of the antecedent English and American cases, the opinion of Judge STORY, in *Blagge v. Miles*, 1 Story, 426, where he says, at page 446: "I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power." And see *Gratwick's Trusts*, L. R., 1 Eq. 177; *Attorney-General v. Wilkinson*, 2 id. 817; *Johnson v. Stanton*, 30 Conn. 297.

Now, although we can have no doubt that the rule of the common law in England, and wherever in this country it has not been changed by legislation, is in accordance with the doctrine declared by these numerous and most respectable authorities, we cannot refrain from expressing our extreme dissatisfaction with this supposed condition of the law.

Perhaps Lord ELDON used too strong language, if he made the remark attributed to him by Sir JOHN LEACH, in *Hughes v. Turner*, 3 Myl. & K. 688, that the rule, "although professed to be adopted in order to further the intention of the testator, in nine cases out of ten defeats that object."

However that may be, and whether the rule is the result of a correct interpretation of the law or not, its practical operation was found to work injustice in so many instances that British legislation was invoked for a remedy, and it became enacted by the Statute of Wills of 7 Wm. IV & 1 Vic., ch. 26, § 27, "that a general devise of real or personal estate shall operate as an execution of a power of the testator over the same, unless a contrary intention shall appear on the will."

"By this statute," says Judge STORY, in a note to *Blagge v. Miles*, before cited, "all these refined and subtle distinctions, in relation to the execution of powers, are now swept away in England, and the doctrine has at last settled down in that country to what would seem to be the dictate of common sense, unaffected by technical niceties."

See, also, the remarks of HOAR, J., in *Avery v. Meredith*, 7 Allen, 897, where the rule of the common law is repudiated.

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But the rule is too clearly recognized and established in our own State to be disregarded. See *Bell v. Twilight*, 22 N. H. 500. And while we cannot let the occasion pass without expressing our doubts as to its practical justice, we feel quite confident that its application to the present case will do no wrong, but, on the contrary, will fully effectuate the intention of both Jacob and Hannah Hersey with regard to the disposition of their several estates.

Our conclusion, in view of all the apparent circumstances, as well as the settled rules of construction, is, that Mrs. Hersey, by her last will, did not execute — as she did not intend to execute — the power conferred by the will of her husband.

The counsel for the appellants refer us to but two cases in support of their position upon this branch of the case. Neither of them is in point. In the one (*Jackson v. Coleman*, 2 Johns. 392) there was no limitation of a life estate to the wife, the testatrix, and no power to be executed by her; in the other (*Harris v. Knapp*, 21 Pick. 412), as we have already observed, the question was not as to the execution, but related only to the extent of the power.

The appellants, however, insist that, even in the position in which this case is placed by the opinions now expressed, their third reason for appeal must be allowed.

This is, because the judge of probate, in the final settlement of the account of the executor of Mrs. Hersey's will, allowed him the sum of \$262.96 for cash which he had paid to the executor of Jacob Hersey's will, which sum was the amount of money that had been paid to Mrs. Hersey from her husband's estate.

This money was a part of the gross amount of personal estate derived from her husband, the whole being, as appraised, \$1,048.96; and this money was not kept separate by Mrs. Hersey, and in its use by her, no distinction was made between it and other money belonging to her, not derived from her husband.

Upon this point, the position of the appellants seems to be, that, since Mr. Hersey received personal estate from her husband to the amount of \$1,048.96, and had at her death only \$814.97, therefore she must have executed her power of disposal over the difference, which is \$233.99, and that to that extent, at least, the executor's claim for \$262.96 was improperly allowed; but, further than this, that the commingling of the money derived from her husband with her own money, and the indiscriminate use of the whole, constitute

a disposal of the money, within the meaning of the will, and was an execution of the power to divest the remainder.

But the argument, so far as it is based upon an exhibition of figures, fails; for, by examination of the inventory of Mrs. Hersey's estate, to which we are referred by the case, it appears that the articles of personal property which she received from her husband's estate, and which, at the time of her death, remained unchanged in form, are not included in the \$814.97, but are returned in the inventory separately as "an inventory of articles which belonged to the estate of Jacob Hersey, and which is in controversy as to title."

These articles amount to \$342.77. There are also the avails of the hay cut on the land, and which would be a part of the proceeds of Mrs. Hersey's estate for life, amounting to \$128, and these sums, added to the rest of the personal estate, make the total \$1,285.74, instead of \$1,048.96, or \$236.78 more than the amount derived from her husband's estate.

These figures, however, do not afford us much aid, while they furnish no support to the appellant's argument; for it does not appear how much personal property Mrs. Hersey had in her own right, at the time of her husband's death, nor how much of that derived from her husband was of such character that it would necessarily be destroyed and consumed in the using.

A change of form in the nature of personal property, which can only be profitably enjoyed by making such change, is by no means to be regarded, *per se*, as an execution of a power of disposition over it. The profitable use of money is obtained only by its investment in securities paying interest, or in property, like live stock, for example, on a farm, from the labor of which profit may be derived. The remainder-man is not defrauded nor harmed — his estate is not divested nor diminished — if the money, the \$262.96 limited to him by Jacob Hersey's will, comes to him at last through Mrs. Hersey's executor, whether that money, in the meantime, has been usefully employed or kept "laid up in a napkin."

The tenant for life is entitled to the use of the money. She is not required to give security for it to the remainder-man, and her executor is only bound to account for the fund, not for the identical money, precisely as he has done in this case. *Weeks v. Weeks*, 5 N. H. 326; *French v. Hatch*, 28 id. 352; *Healey v. Toppan*, 45 id. 243.

In *Healey v. Toppan*, it is said that "there is nothing in the fact

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that real and personal estate are bequeathed together, at the same time, and in the same general or residuary bequest, that tends to show that the testator intended that the personal property, or any part of it, should be enjoyed *in specie* by the tenant for life."

A change, therefore, in the precise form of the property, whether it be goods, perishable or otherwise, or money, in order to the practical and profitable use of the same by the tenant for life, cannot be assumed to be the exercise of absolute dominion over it, and a conversion of it.

Money is not property of that perishable nature which is necessarily consumed in the using of it. The use may be enjoyed, and the equivalent avails of the same thing retained for the benefit and as the property of him to whom the principal is limited.

Any lawful use of the money, as tenant for life, is not to be deemed an execution of the power of disposal of it, in the absence of any act evincing that intent. What is relied upon by the appellants as an execution of the power, is just what the tenant for life would naturally do in the exercise of her rights as tenant for life.

The principles which we have already recognized apply fully in this connection; and as a conveyance of property, by deed or will, will not be regarded as an execution of a power over it, in the absence of any reference to the power or the subject of it evincing an intention to execute it, unless the deed or will must otherwise be inoperative — so, here, such an act *in pais* as the use of this money, in the only manner consistent with the profitable enjoyment of it conferred by her husband's will, cannot be regarded as an execution of a power over it.

The equivalent sum of money paid by the executor of Jacob Hersey's will has been paid to the remainder-man by the executor of Mrs. Hersey's will, in pursuance of the intention, not only of the original testator, but also, so far as appears or can be inferred, in pursuance of the design of Mrs. Hersey, and the duty imposed upon her.

The conclusion of the whole matter is, that the reasons for appeal are disallowed, and the decree of the probate court is affirmed.

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(52 N. H. 355.)

Common carrier — transportation of cattle.

A common carrier transported cattle, which the owner had assumed the responsibility of placing in the vehicles, and they were injured *in transitu*, either from their own fault or the mode of loading them but through no fault of the carrier. *Held*, that the carrier was not liable for such injuries, and did not insure against them. (*See note, p. 53.*)

ASSUMPSIT. Lucius Rixford and others against J. Gregory Smith and others, defendants, as manager of the Vt. Cent. & Vt. & Can. R. R. common carriers.

One of the plaintiffs contracted with defendants' station agent at St. Albans, Vt. to transport thirty-one cattle to Keene, N. H., paying \$68 for the use of the car. He informed the station agent that one Rugg, of whom the cattle were purchased, would load the car, and that neither he, the plaintiff, nor his agent would accompany the train. Rugg employed one Keniston to load the car which he did by the assistance of others procured by him. During the loading defendants' said station agent came up and objected to the loading, stating that it was overcrowding, and asked if any one was going with the cattle, and on being answered "no" replied that he would not ship them except at owners' risk, as the car was overloaded. Keniston said he obeyed orders, and the agent told him to remember what he had said for he was afraid there would be trouble about the cattle.

Defendants requested a charge that they, as carriers of live stock, were not under the ordinary common-law liability of common carriers, but only liable for want of ordinary care and skill. The court declined, and did charge that the common-law liability of a common carrier of living animals is the same as his liability in regard to other merchandise. When he undertakes their carriage he assumes the duty of delivering them safely against all contingencies except such as would excuse the non-delivery of other property. This general rule is subject to the apparent exception that the carrier is not to be liable for injuries resulting from the peculiar character of the animals. Vicious animals may destroy each other, frightened ones may die of terror or disease, or die in spite of all

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precautions; and in such cases the carrier is not liable as he does not insure live stock against the consequences of its own vitality. To the refusal to charge and the charge defendants excepted. The jury disagreed, and case reserved to settle the law of it for the next trial.

Wheeler & Faulkner, for plaintiffs.

Mr. Cushing, for defendants.

DOR, J. Under some circumstances, and to some extent, common carriers are insurers by force of public expediency or policy recognized by the law as equivalent to practical reasonable necessity. Such policy, amounting to such reasonable necessity, is the reason of the law of common-carriage insurance; and the reason of the law shows when and to what extent a common carrier is an insurer. What is the reason of the law?

“The law charges this person (the common carrier), thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.” **HOLT, C. J.**, in *Coggs v. Bernard*, 2 *Ld. Raym.* 909, 918.

“The question is, whether the common carrier is liable in this case of fire. * * * A carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the king’s enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man; for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king’s enemies, or by such act as could not happen

by the intervention of man, as storms, lightning and tempests. If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose and share the spoil. In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man, for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident." Lord MANSFIELD, in *Forward v. Pittard*, 1 D. & E. 27, 33.

"In a state of society such as that we live in, in which we are supplied with the necessities and conveniences of life by an interchange of the produce of the soil and industry of every part of the world, so much property must be intrusted to carriers that it is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible; and that they should be such as to provide for the safe conveyance of property, and at the same time protect the carrier against risks, the extent of which he cannot know, and therefore cannot determine what precautions are proper for his security. * * * When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies." BEST, O. J., in *Riley v. Horne*, 5 Bing 217.

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“This law is enforced on principles of public policy, to prevent fraud and collusion with thieves and robbers—the owner of the goods, not being generally in a situation to oversee and protect his property, having placed it in the possession and under the control of the carrier; and the pay of carriers is graduated upon such liability.” HUBBARD, J., in *Thomas v. B. & P. R. Co.*, 10 Metc. 472, 476.

“The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods, to prevent combinations, chicanery and fraud.” SPENCER, J., in *Roberts v. Turner*, 12 Johns. 232, 233.

“The law, in relation to carriers, has in some instances operated with severity, and they have been charged with losses against which no degree of diligence could guard. But cases of this description are comparatively of rare occurrence; and the reason why they are included in the rule of the common law is, not because it is fit in itself that any man should answer without a fault, but because there are no means of effectually guarding the public against imposition and fraud, without making the rule so broad that it will sometimes operate harshly.” BRONSON, J., in *Hollister v. Nowlen*, 19 Wend. 234, 240.

“The reason for this distinction (between a carrier of goods and a carrier of passengers) was given at an early period. It is, that in consequence of the public nature of his employment and the danger of collusion with plunderers, it is necessary to regard a common carrier as an insurer. * * * The necessity of the application of a stringent rule to simplify and define the responsibilities of common carriers has been repeatedly declared.” GILCHRIST, C. J., in *Elkins v. B. & M. R. Co.*, 23 N. H. 275, 285.

“The reasons upon which the strict rule of the common law was founded are extremely obvious, and have been often stated. While the goods are in the course of transportation, the carrier has the sole charge of them, and the owner has no power to protect his property by any care of his own. The carrier has the most tempting opportunities for embezzlement, and for fraudulent collusion with others. It would be extremely difficult in all cases, and in many cases quite impossible, for the owner to prove the fraud or negligence by which his goods had been lost. The policy of the law imposed the loss upon the party to whose fidelity and care the property was intrusted, and thus encouraged the utmost diligence,

where negligence, if it existed, could seldom be detected. This simple and uniform rule fixed the rights of the parties, and prevented dispute and litigation. The reasons for adhering to the ancient rule still exist in unabated force. Collusion with thieves and robbers is perhaps less to be apprehended now than in the rude times when the rule was first established. But, on the other hand, the immense increase of the business, the inestimable value of the commodities now intrusted to the charge of common carriers, and the vast distances to which they are transported, have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have added greatly to the opportunities and temptations of the carrier who might be disposed to neglect or violate his trust. On the whole, we are not able to see any change in the business of common carriers which calls for a modification of the old rule. Nor does there appear to be any real hardship in the application of this rule to the common carrier. The price of transportation will include a reasonable premium for this kind of insurance. The rule being uniform and well understood, in this as in other similar cases, the rate of compensation regulates itself; and the loss, if no fault can be charged anywhere, will be cast, on principles of true policy, upon the party whose diligence and care will be encouraged and stimulated by the risk." PERLEY, J., in *Moses v. B. & M. R.*, 24 N. H. 71, 84, 85.

While the authorities give an idea of the reason of the law of common-carriage insurance sufficiently accurate for ordinary practical purposes, they exhibit the difficulty of condensing the whole reason in a brief formula, or even expressing it in many words with absolute precision. The dangers of embezzlement and collusion with thieves, generally given as the reason, might be sufficient when the property is lost, but not when (as in the present case) it is delivered at its place of destination in a damaged condition. The carrier's exclusive possession of evidence, the difficulties under which the bailor might labor in discovering and proving the carrier's fault, his inability to contradict the carrier's witnesses, the necessity of avoiding the investigation of "circumstances impossible to be unraveled," the importance of stimulating the care and fidelity of the carrier, and the convenience of a simple, intelligible, and uniform rule in so extensive a business, would constitute a much broader ground. The reason is such as shows that it is better for the bailor to be compelled to pay the carrier a premium

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for insurance against certain dangers of transportation beyond the power of the carrier to avert, than to bear the risk himself. The reason is such that it does not apply to the transportation of a passenger, and does apply, under some circumstances, and to some extent, to the transportation of his baggage. It is said to generally include property destroyed by fire not caused by lightning: but it does not include property burned by its owner. It does not extend to property lost or injured by the fault of the owner. *Whalley v. Wray*, 3 Esp. 74; *Edwards v. Sherratt*, 1 East, 604, 609, 610; *G. W. R. Co. v. Talley*, 23 L. T. (N.S.) 413; *White v. W. Co.*, 7 Cush. 155; *Tower v. U. & S. R. Co.*, 7 Hill, 47; 2 Kent's Com. 603.

It does not apply to those rights of service of children or apprentices, which are rights of property, nor to chattel slaves. "A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods." MARSHALL, C. J., in *Boyce v. Anderson*, 2 Pet. 150, 154, 155; *Clark v. M'Donald*, 4 McCord, 223.

The case of slaves carried for their owner as his property, puts in a strong light the reasonable and logical character of this branch of the law, and the necessity of considering the nature of the property, and, to some extent, the nature of the loss or injury, when the question of insurance is raised. Slaves are property, as cattle are: they may run away from the carrier; they may have as strong inducements as cattle can have to escape; they may maim themselves, or commit suicide, or die natural deaths, in the carrier's possession;—and if in any of these ways their owner suffers a loss of what the law regards as valuable property, the carrier, if without fault, is not liable. And many other cases illustrate the legal principle, which can be well elucidated by examples, and is suggested,

but not fully explained, by the short general rule and two exceptions in common use. A common carrier of menageries might be held to insure against such external dangers as those of collision of trains, running off the track, breaking bridges, car-wheels, or other machinery of the carrier, and against certain inevitable accidents not caused by the uncontrollable character of the freight; but such an internal danger as that of a bailor's wild beasts destroying each other in his cage, in which they were received by the carrier, and in which they were to be transported by him, would not come within the reason of the law of common-carriage insurance. The fault would be in the freight or in packing it, and, in either case, would be, in a certain sense, the fault of the bailor. And although the fault were apparent and known to the carrier, it would not be his duty to remedy it by repacking. The sending of such freight in cages would be an order of the bailor to carry it packed as it was. So, in the present case, the plaintiffs were not insured against damage caused by their own fault. If they had hired thirty-one sufficient cars, and put one animal only in each car, there would have been no damage from their injuring each other. And when the plaintiffs hired one car, and caused thirty-one cattle to be put into it, they did not understand that any part of the \$68 which they paid for the use of the car was a premium for insurance against the natural and necessary consequences of their own acts. *Kimball v. R. & B. R. Co.*, 26 Vt. 247. The defendants, furnishing such accommodations as the plaintiffs desired, or as good as they were willing to pay for, were not in fault for the mode of transportation chosen by the plaintiffs. Sending live cattle or allowing them to be sent on a railroad, in cars loaded in the usual manner, is not an exercise of a high degree of care for the safety and welfare of the animals. It may be, financially, a judicious thing for the owner to do. His profits may exceed his losses. But there is a degree of negligence, not to say cruelty, on the part of the owner in such a transaction, against which the carrier is not required to insure him.

When a common carrier is an insurer by force of his public, official, common-law duty, he can refuse to carry unless he is paid a premium for insurance; he can insist upon his right to insure, and the bailor can insist upon his right to be insured by the carrier. This kind of insurance is not an independent transaction, optional with each party, but an incident of common carriage, and separable from it only by mutual agreement. Such insurance, including the

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right to insure and the right to be insured, is founded upon principles very different, in some respects, from those of fire, marine and life insurance. Its object is material to be considered; and its object is merely subsidiary to that of transportation. When a man delivers fruit, vegetables, milk, butter, eggs, meat, fish, live animals or other perishable property, to a common carrier, his object is transportation, and not insurance against the irresistible operation of the laws of nature. His object is, a certain change in the locality of his property — not an insurance for a certain time, against all change in its character and condition. The warranty he desires is of the safety of the transportation, not of the absolute preservation of his property from its own action.

Not only is the owner of chattels sent by a common carrier not insured by the carrier against their explosion (*Parrot v. Wells*, 15 Wall. 524), fermentation, putrefaction, dissolution, spontaneous combustion, growth, decay, disease or death, but he may be liable to the carrier for damage caused by such natural processes, or by the insufficiency of his casks, boxes or fastenings, or other undisclosed unfitness of his property for the journey on which it is sent. Instead of being insured against his own negligence, he may be answerable for injuries which it inflicts upon the carrier.

If the reason of the law of compulsory common carriage insurance were merely a difficulty of proof, it might reach a case where the fault was in the freight or its owner. When property is delivered in a damaged condition at its place of destination, it may sometimes be as difficult for the owner to prove that the damage was caused by the carrier's negligence, or to rebut the carrier's evidence on that point, as to prove that goods not delivered by the carrier had been lost by his negligence. But the reason of the law has some regard for the fundamental principles of justice as well as the demands of convenience. And it would be contrary to all legal reason, whether of natural justice, public policy or private convenience, to empower an owner of property to compel a common carrier to insure it against the fault of the owner, or against such a fault of the property as must be considered the fault of the owner. Such a system of insurance would encourage fraud, and unreasonably increase the premium which the whole community must pay.

So far as the contract in this case was to be performed in Vermont, it would seem that it would be governed by the law of that State. *Barter v. Wheeler*, 49 N. H. 9, 29; *Gray v. Jackson*, 51 id. 9, 39.

And *Kimball v. R. & B. R. Co.*, 26 Vt. 247, would seem to be an important authority concerning the law of Vermont.

The instructions given to the jury were taken from *Smith v. N. H. & N. R. Co.*, 12 Allen, 531, 533; and, so far as the case may be governed by the law of New Hampshire, they are substantially correct. What was stated as an apparent exception, seems to us to be, as suggested in *Smith v. N. H. & N. R. Co.*, an application of the general rule; and the general rule is amply sustained by authority. 2 Redfield on Railways, §§ 176, 4; 2 Greenl. Ev., § 220; Story on Bailm., §§ 492a, 563, 565, 566, 576; *Leech v. Baldwin*, 5 Watts, 446; *Hall v. Renfro*, 3 Metc. (Ky.) 51; *Clarke v. R. & S. R. Co.*, 14 N. Y. 570; *M. S. & N. I. R. Co. v. McDonough*, 21 Mich. 165; 4 Am. Rep. 466; *Richardson v. N. E. R. Co.*, L. R., 7 C. P. 75; *Blower v. G. W. R. Co.*, id. 655.

In the latter case, WILLES, J., said: "The question for our decision is, whether the defendants, upon the facts and findings of the county court judge, are liable as common carriers for the loss of this animal. Whether a railway company are common carriers of animals, is a question upon which there has been much conflict of opinion; and although there may be difficulties in determining that question, such as induced Lord WENSLEYDALE, in *Carr v. L. & Y. R. Co.*, to make the observations which have elicited remarks from some learned judges apparently to the contrary, it may turn out after all to be a mere controversy of words. The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves, or disposition producing unruliness or phrensy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing, whether we say that one who carries live animals is not liable in the one event but is liable in the other, or that he is not a common carrier of them at all, because there are some accidents other than those falling within the exception of the act of God and the queen's enemies for which he is not responsible. By the expression, 'vice,' I do not, of course, mean moral vice in the thing itself or its owner, but only that sort of vice which, by its internal development, tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties.

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This becomes more clear when we consider the reason why a common carrier is liable for a loss, though happening without any negligence at all on his part, unless in the case of the act of God or the queen's enemies. * * * A common carrier is liable, as an ordinary bailee, for negligence; and he is liable for a loss occasioned by negligence, even though the act of God or of the queen's enemies conduce to the loss. But he is further liable as an insurer for losses which occur through no negligence on his part. It is only necessary, therefore, to observe that an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes."

It seems to us correct to say that, by an elementary general principle of the law of common-carriage insurance, a common carrier of live animals is not bound to insure them against inevitable accidents caused by their own fault or vice, in the sense explained by Mr. Justice WILLES. And we do not see how this principle can relieve the carrier from the liability of an insurer on other points, to which this principle has no application. He may still be bound to insure against inevitable accidents caused by defects in his road, track, cars and machinery, and against loss by embezzlement, theft and trespass, when he has such exclusive possession and control of the property carried as require him to be an insurer in those particulars, on the ground of that public expediency or policy, recognized by the law as equivalent to a practical reasonable necessity, which is the reason of the law, and the foundation of the whole doctrine of this compulsory kind of insurance. *Palmer v. G. J. R. Co.*, 4 M. & W. 749, 758; *Brind v. Dale*, 8 C. & P. 207; *Willoughby v. Horridge*, 12 C. B. 742; *Martin v. G. I. P. R. Co.*, L. R., 3 Exch. 9; *White v. W. Co.*, 7 Cush. 155; *N. J. S. N. Co. v. Merchants' Bank*, 6 How. 344.

"Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach. * * * Considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exception requires." DENIO, C. J., in *Clarke v. R. & S. R. Co.*, 14 N. Y. 570, 574.

When the rule is applied as far as the reason of it requires, and no further, there is no departure from the law, and no exception to

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the rule. The general principle does not transcend the bounds of the sound policy upon which it is based. The legal structure, in its length and breadth, is co-extensive with its foundation. Where the reason of the law stops, the law itself stops.

The decisions directly in point are much less numerous than they would have been but for an unfortunate innovation introduced in Westminster hall. The English courts having adopted a new and erroneous doctrine, giving effect to notices and conditions by which common carriers sought to limit their common-law liability, "the rule of the common law has been substantially restored" by parliament. *Moses v. B. & M. R.*, 24 N. H. 71, 87; *Hollister v. Nowlen*, 19 Wend. 234, 237, 241-243, 248, 249, 250. By the Railway and Canal Traffic Act of 1854, 17 and 18 Vic., ch. 31, § 7, such notices and conditions of railway or canal companies are declared void, except such conditions as shall be adjudged to be just and reasonable by the court; and no special contract between any such company and any other parties, respecting transportation, is binding upon any such party, unless signed by him or by the person delivering the property for carriage. Such conditions, to be binding, must not only be, in the opinion of the court, just and reasonable, but must also be embodied in a special contract in writing, signed by the owner, bailor, or person delivering the goods to such company. *Simons v. G. W. Ry. Co.*, 18 C. B. 805; *L. & N. W. R. Co. v. Dunham*, id. 826; *Aldridge v. G. W. R. Co.*, 15 C. B. (N. S.) 582; *Peek v. N. S. R. Co.*, Ellis, B. & E. 958; S. C., id. 986; S. C., 4 B. & S. 1005; 10 H. L. Cas. 473.

"The intention of the legislature in passing the act in question (17 and 18 Vic., ch. 31) was, to place the whole railway system under the control of the court." JERVIS, C. J., in *L. & N. W. R. Co. v. Dunham*, 18 C. B. 826, 829. English cases abound in, and generally turn on notices, conditions, special contracts, and statutes. So far as they show what are regarded in England as just and reasonable conditions, they may be of some value in this country. But the errors that prevailed there before the interposition of parliament, and the modified forms in which the common law has been restored by legislation, prevent our receiving much of that assistance which would have been afforded by the English authorities, had there been no departure from the old law in that country. *Hinton v. Dibbin*, 2 A. & E. (N. S.) 646; *Shaw v. Y. & N. M. R. Co.*, 13 id. 347; *Austin v. M. S. & L. R. Co.*, 10 C. B. 454; S. C., 16 A. & E.

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(N. S.) 600; *Carr v. L. & Y. R. Co.*, 7 W. H. & G. 707; *Walker v. Y. & N. M. R. Co.*, 2 E. & B. 750; *Beal v. S. D. R. Co.*, 5 H. & N. 875; S. C., 3 H. & C. 337; *Y. N. & B. R. Co. v. Crisp*, 14 C. B. 528; *Hughes v. G. W. R. Co.*, id. 637; *Slim v. G. N. R. Co.*, id. 647; *MacAndrew v. E. Telegraph Co.*, 17 id. 3; *Wise v. G. W. R. Co.*, 1 H. & N. 63; *Pardington v. S. W. R. Co.*, id. 392; *White v. G. W. R. Co.*, 2 C. B. (N. S.) 7; *M'Manus v. L. & Y. R. Co.*, 2 H. & N. 693; S. C., 4 id. 327; *Coxon v. G. W. R. Co.*, 5 id. 274; *Lewis v. G. W. R. Co.*, id. 867; *Harrison v. L. B. & S. C. R. Co.*, 2 B. & S. 122; S. C., id. 152; *M'Cance v. L. & N. W. R. Co.*, 7 H. & N. 477; *Garton v. B. & E. R. Co.*, 1 B. & S. 112; *Gregory v. W. M. R. Co.*, 2 H. & C. 944; *Hodgman v. W. M. R. Co.*, 5 B. & S. 173; *Allday v. G. W. R. Co.*, id. 903; *Chippendale v. L. & Y. R. Co.*, 7 Railway Cas. 824; 15 Jur. 1106; 12 L. J. (Q. B.) 22; *G. N. R. Co. v. Morville*, 7 Railway Cas. 830; 16 Jur. 528; 21 L. J. (Q. B.) 319; *Lloyd v. W. & L. R. Co.*, 15 Irish C. L. 37; *Dodson v. G. T. R. Co.*, 7 Canada L. J. (N. S.) 263; *P. & O. S. N. Co. v. Shand*, 3 Moore's P. C. C. (N. S.) 272; *Baxendale v. G. E. R. Co.*, 10 B. & S. 212; *G. W. R. Co. v. Redmayne*, L. R., 1 C. P. 329; *Lord v. M. R. Co.*, L. R., 2 C. P. 339; *Rooth v. N. E. R. Co.*, L. R., 2 Exch. 173; *Zunz v. S. E. R. Co.*, L. R., 4 Q. B. 539.

Case discharged.

NOTE.—There are two classes of American decisions with regard to the liability of carriers of live stock—the one holding such carrier liable to the strict rule of the common law as to common carriers for all injuries, not occasioned by the peculiar nature or propensities of the animals; and the other holding that the strict liability attaches only as to the sufficiency of the vehicles, and the proper making up and running of the train.

A leading case among the first class is that of *Clarke v. The Rochester & Syracuse R. R. Co.*, 14 N. Y. 570, wherein it was held, that common carriers, if they undertake to carry cattle, are, in the absence of a special agreement limiting their liability, responsible not only for a safe and careful conveyance of the car containing them, but also for any injury which can be prevented by foresight, vigilance and care, although arising from the conduct of the animals—and this responsibility was not relieved by the fact that the owner of the cattle was present and aided in loading them, and was allowed a passage for himself in the train which carried his cattle. To the same effect are *Smith v. The N. Y. C. R. R.*, 29 Barb. 135; *Golden v. Pennsylvania R. R. Co.*, 30 Penn. St. 246; *Smith v. New Haven & Northampton R. R. Co.*, 12 Allen, 531; *Hull v. Renfro*, 3 Meto. (Ky.) 51; *Wilson v. Hamilton*, 4 Ohio St. 722; *Powell v. Mills*, 37 Miss. 691; *McDaniel v. Chicago & N. W. Railway Co.*, 24 Iowa, 412; *Kimball v. The Rutland & Burlington R. R. Co.*, 26 Vt. 242.

The latest and most carefully considered of the second class of cases is that of the *Michigan Southern, etc., R. R. Co. v. McDonough*, 4 Am. Rep. 466 (21 Mich. 195), wherein it was held, that while the duties and obligations of carriers of animals in all matters not pertaining to the care, management and risk of the stock, or to the mode of its reception and delivery, were the same as those pertaining to other property, they were not responsible as common carriers for the care and management of the property in

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transitu. It was, of course, admitted that carriers of animals might be subjected to the responsibilities of common carriers by their charter, or by express agreement, or by holding themselves out, or professing to be common carriers of such property; but the burden of fixing such responsibility was held to be on the plaintiff. This decision was re-affirmed in the more recent case of the *Lake Shore, etc., R. R. Co. v. Perkins*, 26 Mich. 829, which is hereafter printed in this volume.

In *Kimball v. The Rutland & Burlington R. R. Co.*, 26 Vt. 242, the court held that railway companies which transport live stock for hire, for such persons as choose to employ them, are liable as common carriers, but that they may, by special contract, limit their liability — and this doctrine that carriers may thus limit their liability, is generally conceded.

In *Penn. v. Buffalo and Erie R. R. Co.*, 10 Am. Rep. 855 (49 N. Y. 204), defendant received from plaintiff five car loads of cattle, to be transported from Erie to Buffalo, under a written agreement, whereby plaintiff assumed all risks of injuries from "delays or in consequence of heat, suffocation or the effect of being crowded upon the cars;" the plaintiff also agreeing to load and unload the cattle at his own risk, the defendant furnishing the necessary assistance. The cattle were in charge of plaintiff's agent. The train was detained *in transitu* three days by a snow storm. The cattle could have been unloaded by constructing a temporary platform, which plaintiff's agent requested defendant to do, but which defendant refused. The cattle remained in the cars, and some of them died. *Held*, that the defendant was not liable. The opinion intimated that but for the written agreement the defendant would be liable as for want of ordinary care. The doctrine was fully recognized that carriers of cattle are not responsible for injuries arising from their nature and propensities, and which care and foresight could not prevent.

So in *Cragin v. The New York Central Railroad Co.*, 10 Am. Rep. 559 (51 N. Y. 61), where defendant transported hogs for plaintiff, under a contract that plaintiff should assume the risks of all injuries to the hogs in consequence of heat, etc., and some of the hogs died from the effects of heat, the result of defendant's negligence, the court held the defendant was not liable under the special contract. The doctrine was recognized in the opinion that the carrier of live stock is not "responsible for such injuries as occur in consequence of the vitality of the freight;" but it was also intimated that the carrier was bound to provide suitable means of transportation, and to exercise that degree of care which the nature of the property requires.

In *Harris v. The Northern Indiana R. R. Co.*, 20 N. Y. 232, it was held that the carrier of cattle was not liable for injuries accruing from defects in the vehicle, where the owner selected the vehicle and was cognizant of its defects, or where such defects were obvious, but that the carrier was bound to point out all defects not apparent to the casual observer; but in *Walsh v. Pittsburgh, etc., R. R. Co.*, 10 Ohio St. 78, where the loss of the cattle arising not through their propensities, but from a defective door and fastening on the car, the company was held liable although the defect was known to the plaintiff when the cattle were loaded, and he expressly agreed to assume the risk therefrom, the court remarking that neither in regard to cattle, nor any thing else, could the carrier stipulate for impunity, while wantonly sacrificing the property of others, or contract for a less degree of care than that required by a mode of transportation necessarily dangerous.

The earlier English cases on this subject are cited and examined in *McDonough's case, supra*. In England, by statute (17 and 18 Vict., ch. 31, § 7), railroad companies are expressly made common carriers of cattle, horses, etc., except as they may limit their liability by such notice or contract as may be held reasonable by the courts. There are two or three recent English cases which deserve notice. In *Richardson v. The North Eastern Railway Co.*, L. R., 7 C. P. 75 (1 Eng. Rep. 126), decided in 1872, the plaintiff delivered a valuable grayhound to the defendant for carriage, and paid the fare demanded. At the time of the delivery the dog had on a leathern collar with a strap attached to it. While on the journey one of the defendant's servants tied the dog by this strap at a station where the dog had to wait till another train came. While so fastened the dog slipped his head from the collar and ran upon the road and was killed. The company had given the notice required by the statute to limit its liability

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in the transportation of animals. It was held that the defendant was not liable, having used the means for fastening the dog furnished by the owner. *The Great Western Railway Co. v. Blower*, 20 Weekly Rep. 776 (3 Eng. Rep. 700), decided by the court of Common Pleas in 1872, was more directly in point. There cattle having been delivered by respondents to be carried on the appellant's railway, were safely secured in a proper truck. During the transit one of them escaped and was killed, its escape being wholly attributable to its own efforts, and in no way to the negligence of the appellants or their servants. *Held*, that whether the appellants were considered as common carriers or not, they were exempt from liability for any thing happening by reason of the proper vice of the thing carried, and that, therefore, the appellants were not, under the circumstances, liable.

WILLES, J., in delivering the judgment of the court, said: "I should be disposed to say that a railroad company who carry live animals are liable as common carriers, but that, in addition to the other exemptions, they enjoy this exemption from liability for any thing which happens to an animal by reason of its proper vice. If such vice exists, liability from its effects is excluded from the contract."

In *Kindall v. The London and South Western Railway Co.*, 20 Weekly Rep. 886 (2 Eng. Rep. 705), decided by the court of Exchequer in 1872, the plaintiff sent his horse by the defendant's railway from London to Ewell; on its arrival it was found to have sustained a cut in the fore-arm, and a dislocation of the fetlock in the course of the journey; the horse was quiet and accustomed to travel by railway, but there was not any negligence on the part of the defendants, and in the course of the journey nothing extraordinary happened to alarm or to excite the horse; there was nothing except the nature of the injuries to show how they were caused. The court having power to draw inferences of fact, *held*, by MARTIN and BRAMWELL, BB. (PIGOTT, B., dissenting), that the injuries were caused by the proper vice of the horse, and that the defendants were not liable in respect thereof.

In *Gill v. The Manchester, etc., Railway Co.*, L. R., 8 Q. B. 186, decided in 1872, a cow was put into a truck belonging to defendants, and on arriving at the place of destination, was brought to a siding by defendant's yard for the purpose of being unloaded. The porter in charge of the yard, though warned not to do so by the plaintiff, unfastened the truck and let her out, and she was killed by a car. The plaintiff had signed a contract agreeing that defendant should not be liable for any loss or injury to the cow in the delivery, if such damage should be occasioned by kicking, plunging or restiveness. The court held that the condition in the contract did not relieve the defendant from liability for negligence on the part of their servants in delivering the cow.—REP.

DARLING V. WESTMORELAND.

(122 N. H. 401.)

Highway, defect in — evidence.

Where an action was against a town for defect in highway, and the alleged defect was a pile of lumber by the side of the road which frightened plaintiff's horse; evidence was offered to show that other horses were frightened in passing it. *Held*, that such evidence was admissible and its exclusion error.

CASE by Charles Darling against the town of Westmoreland for an injury resulting from alleged defects in the highway. These were a pile of lumber by the side of the road calculated to frighten

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horses, and a bridge railing insufficient for protection. Plaintiff claimed that his horse was frightened by the lumber when crossing the bridge, ran back and backed off. One of the defenses was that the horse was vicious and unsafe, and much testimony was presented on both sides of this point. Plaintiff offered to prove by one Cressy that in riding past this pile of lumber with one Fletcher the latter's horse was frightened by it. The court rejected the evidence and the plaintiff excepted.

Mr. Cushing and Lane & Healey, for plaintiff.

Wheeler & Faulkner, for defendants.

DOE, J. One question of fact was, whether the pile of lumber was likely to frighten horses. *Winship v. Enfield*, 42 N. H. 197; *Chamberlain v. Enfield*, 43 id. 356; *Bartlett v. Hooksett*, 48 id. 18. On this question, the plaintiff had the affirmative and the burden of proof. He had a right to prove that the pile was likely to frighten horses, because he would fail in this part of his case unless he did prove it. For all the purposes of this case, nothing could be more irrelevant than a pile not likely to frighten horses. It was not the pile, but the character of the pile—its capacity for frightening horses—that the plaintiff complained of. It was possible for some competent evidence on this subject to exist, to be found, and to be given to the jury. It was not necessary that the plaintiff's evidence on this point should tend to prove all the other points of his case. It was not necessary that his evidence on this point should tend to prove that the way was a highway, or that the railing was insufficient, or that the town had or ought to have had notice of the unsuitableness of the way for the travel thereon, or that the plaintiff was injured, or that he was in the exercise of reasonable care. The evidence to prove several independent propositions or distinct facts may be of different kinds, and drawn from different sources. *Bridge v. Eggleston*, 14 Mass. 245; *Foster v. Hall*, 12 Pick. 89, 99, 100; *Blake v. White*, 13 N. H. 267; *Hale v. Taylor*, 45 id. 405, 407; *Delano v. Goodwin*, 48 id. 203, 206.

Another point of the plaintiff's case was, that his horse was frightened by the lumber. How could the plaintiff prove that? By witnesses testifying that his horse appeared to be frightened, or that, in their opinion, he was frightened, or (to omit superfluous words, and speak in that positive manner in which witnesses would

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generally testify on such a subject) that he was frightened. *Whittier v. Franklin*, 46 N. H. 23. And the fright of Fletcher's horse could be proved in the same way. The only question of law in this case is, whether the fright of Fletcher's horse, when proved, would be a fact of any relevancy and materiality as evidence upon any question of fact in controversy. If the only question of fact in controversy were, whether the plaintiff's horse was frightened by the lumber, that question might involve the question of the capacity of the lumber to frighten him, and that might involve the secondary question of its capacity to frighten other horses. But, in this case, the two primary questions arose, whether the lumber was likely to frighten horses, and whether it did frighten the plaintiff's horse. Was it of such a character, quality, and condition, that it could, and probably or manifestly would, be an object of terror to horses in general, or horses of ordinary gentleness or of average skittishness? That was one question. Was the plaintiff's horse frightened by it? That was another and very different question. Each of these questions was original, and independent of the other. Evidence might be introduced on either of them, without any reference to the other. And it is to be specially observed that the former question is, not whether the lumber was likely to frighten Darling's, or Fletcher's, or any other particular horse, but whether it was likely to frighten horses.

Was the fright of Fletcher's horse competent evidence on the question whether the lumber was likely to frighten horses? No one doubts that the fright of the plaintiff's horse was competent evidence on that question; and, ordinarily, where evidence of one experiment is admissible to show the character of inanimate matter, evidence of two experiments of the same kind is not inadmissible. There is nothing in the facts of the reserved case showing any peculiarity in the plaintiff's horse that should make his terror a conclusive test of the terrifying character of the pile. For aught that appears upon the facts, he may have been very inferior to Fletcher's horse as an animal to make a fair experiment with for the purpose of testing the character of the pile. On the independent and general question of the horse-frightening capacity of a certain pile of lumber, what rule of law considers the fright of Mr. Darling's horse as important, and disregards the fright of Mr. Fletcher's horse as of no consequence at all? If the ability of the pile to frighten horses rendered the highway "unsuitable for the

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travel thereon," and the town were in fault, an indictment would lie as well as this action. Gen. Stat., ch. 68, §§ 1, 2; ch. 69, § 1. And, in the trial of such an indictment (*King v. Pease*, 4 B. & Ad. 30), the fright of Fletcher's horse could not be excluded while the fright of Darling's was received. In the civil and in the criminal case, one fact to be proved, namely, the character of the pile in respect to its power of frightening horses, is precisely the same; and, in each case, on that point, there is no more reason for admitting the fright of Darling's horse and rejecting that of Fletcher's, than there is for admitting that of Fletcher's and rejecting that of Darling's. The only way to reject one, by the application of an absolute rule of law, is to reject both, and to hold that the jury should have been instructed (contrary to the universal practice) that the fright of Darling's horse was no evidence that the lumber rendered the road unsuitable for the travel thereon. The terrifying quality of the pile being the question, the terror of Fletcher's horse is no more collateral than the terror of Darling's. Should they both be excluded from the consideration of that question? And should the evidence that the plaintiff's horse was vicious and unsafe on other occasions also have been excluded?

If the question were, whether the lumber was capable of floating in water, or making a good fire, or being sawed or cut or planed in a specific manner, or supporting horses and wagons passing over a bridge, there could be no legal objection to the trial of an appropriate experiment upon it in the presence of the jury, or to the evidence of experiments that had been tried elsewhere. And there is no reason, outside of the technical rules of the law, why its ability to frighten horses should not be tested out of court, and proved in court in the same manner. When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether any thing can be done or is likely to be done, one way is to speculate about it, and another way is to try it. The law is a practical science, and when it is appealed to to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any

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one asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guesswork, the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can be justly called a principle. By what technical rule, at war with reason and principle, is it supported?

The only rule relied upon to exclude experimental knowledge in such a case as this, is the rule requiring the evidence to be confined to the issue,—that is, to the facts put in controversy by the pleadings, prohibiting the trial of collateral issues,—that is, of facts not put in issue by the pleadings, and excluding such evidence as tends solely to prove facts not involved in the issue. This rule merely requires evidence to be relevant. It merely excludes what is irrelevant. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge. A fact as relevant, and as directly involved in the issue of guilty or not guilty, between these parties, as any fact in controversy, was, the likelihood or probability of the lumber frightening ordinary horses. There was nothing collateral—that is, nothing irrelevant in that. To that point the fright of Fletcher's horse was no more collateral than the fright of Darling's. And the combined fright of both horses was no more collateral, in a legal sense, than would be the combined results of any two experiments that could be tried to test the frightening power of the lumber. The rule confining the evidence to the issue, and excluding evidence bearing solely upon collateral issues—that is, irrelevant issues, issues not raised by the pleadings—has not been relied upon to exclude all evidence of all experiments in all cases. But it is sometimes inadvertently relied upon, in cases of this kind, where the plaintiff avers damage caused by the dangerous character of something for which the defendant was responsible, to admit the plaintiff's experience, on the occasion of his alleged injury, as competent evidence of the character of the thing complained of, and to exclude the experience of others equally relevant and equally material on that point. There are a few cases which go to show, as matter of authority, that, on the question whether this pile of lumber was calculated to frighten horses, while the competency of the experiment with Darling's horse is not to be questioned, the experiment with Fletcher's is incompetent. The

doctrine of those cases, applied to this case, would be founded on the error of taking it for granted that Darling's experiment is the point in issue, and holding Fletcher's to be collateral to Darling's, when the frightening power of the lumber is a point in issue; and, to that point, Fletcher's experience is no more collateral than Darling's, and neither of them is collateral in any legal sense.

The error which has occurred, in some cases, is a misapplication of the rule which excludes irrelevant evidence, and is easily accounted for.

1. The plaintiff's experience, on the occasion of his alleged injury, has been a fact first and necessarily received as competent evidence on other points than the character of the thing complained of; being in evidence on other points, it has been considered, without objection, as evidence on that point; but the experience of other persons, equally relevant on that point, has seemed to have an objectionable appearance, because it did not come into the case in the same unobjectionable way as that by which the plaintiff's experience was introduced, and because it was collateral to some point to which his was not collateral.

2. The rule, requiring evidence to be relevant, is so often spoken of in the books as hostile to collateral issues, without a very explicit accompanying definition of the term "collateral," that a vague notion of the rule excluding something besides irrelevant evidence would be likely to open the way for a definite and serious mistake. And the confusion resulting from such a notion might be increased by other legal uses of the term, as in "collateral descent or succession," which is not always irrelevant, and in "collateral security," which conveys no idea of irrelevancy. It would seem to be a sufficient reason for the rule confining the evidence to the point in issue,—in other words, excluding irrelevant evidence,—that a judgment is the object of a trial; a judgment cannot be rendered on the finding of any other fact than that put in issue by the pleadings; and the finding of useless facts on which no judgment can be rendered, is not a duty with which the tribunal is charged. To set aside a verdict for the admission of evidence not confined to the issue, the party objecting must have been prejudiced by it; the evidence must have been not only irrelevant, but also calculated to influence the jury to his injury. But irrelevant evidence, not injurious to either party, should be excluded, because it cannot aid in the decision and settlement of the point in issue; because it has no

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tendency to produce that judgment which is the sole object of the trial; if it would be injurious it should be excluded, because it cannot legally aid in the rendition of the judgment, and, therefore, cannot answer the only purpose for which evidence is received. That is reason enough for its exclusion; and some of the other reasons sometimes given are calculated to convey an indefinite and confused if not a wrong impression of the object and meaning of the rule.

3. The tendency to error has been aggravated by an exception (which is a peculiarity of precedents of English origin), excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged, and his habitual commission of crimes or torts of a like kind as proof of such disposition. That such evidence is relevant, the law acknowledges by receiving, in criminal cases, and in some civil cases (1 Greenl. Ev., §§ 54, 55; *Wood v. Gale*, 10 N. H. 247) evidence of a defendant's good character in his favor, and allowing such evidence to be rebutted, and by receiving evidence of the character of witnesses and of other persons (1 Greenl. Ev., § 54). The exclusion of such evidence is a plain departure from the general principle which admits relevant and material evidence. There is reason to believe that this exception originated in a usurpation of legislative power by English judges, led by a merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation.

"It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense; and judges, through compassion, will respite one-half of the convicts, and recommend them to the royal mercy." 4 Bl. Com. 18, 19. "The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the

offender from the extreme torment of being dragged on the ground or pavement." 4 Bl. Com. 92.

Under a criminal code of one hundred and sixty capital offenses, courts were exposed to a temptation, greater than they were able to resist, to strain the law, and moderate its barbarity by the introduction of anomalies and logical deformities, *in favorem vitæ*, in the interest of humanity. So far did they go, in overturning elementary doctrine, that, on a convict's application, they reversed the judgment against him for a mistake made in his favor. *McKean v. Cutler*, 48 N. H. 370, 375; *Stevens v. Commonwealth*, 4 Metc. 360, 371; *Reg. v. Hartnett*, Jebb, C. C. 302; 1 Ben. & H. Ld. C. C., *note*, 1st ed. Whether a judgment of death should be reversed because the sentence did not require the dissection and anatomization of his body after execution, the twelve judges were equally divided in opinion; but the six who thought the omission was not a fatal defect in the judgment, came to that conclusion upon the construction of a particular statute, and not upon any general principle. *Rex v. Fletcher*, Russ. & Ry. 58. The compassion excited by the severity of English statutes is enough to account for the strictness of some of the exceptions of criminal pleading and evidence which have been allowed to outlive the cause and reason of their existence. Arbitrary in their nature, originally enacted by judicial legislation, *in favorem vitæ*, wholly based upon the sacredness of human life so brutally violated by acts of the British parliament, and specially designed as a partial nullification of those acts, they are of a piece with the illegal use of the sledge or hurdle "by connivance, at length ripened by humanity into law;" and they are, in this State, at the present time, as much out of place as that British mode of conveying traitors to the gallows. The influence of such illegal exceptions, coming at length to stand for legal examples in constant use, has been felt beyond the practice in criminal cases, and has engendered confusion in the body of English law inherited by us. Why they have not ceased by operation of the common law of limitations, *cessante ratione legis cessat ipsa lex*, and why they are adhered to, though not adapted to our circumstances (*Lisbon v. Lyman*, 49 N. H. 553, 582) may be explained by the force of the habit of following English precedent. There is no pretense that an exclusive right to introduce such innovations, and forever prohibit the innovation of abandoning them, was vested in the courts of former times. It is no departure from legal principle not to continue

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a course that was a mere nullification of the temporary law of parliament, and an unconstitutional usurpation that has now lost even its sole excuse of obedience to the higher law of humanity. The conflict of laws having ceased, the temptation of courts to nullify the lower law which they are sworn to enforce has passed away. And however much reverence may remain for ancient innovations in behalf of human life under circumstances no longer existing, and however strong may be the inclination derived from that reverence and from habit to adhere to the practice of excluding evidence of human character furnished by experience, the extension of that practice to the rejection of experimental knowledge of the character of inanimate matter ought to stop.

4. Another cause of confusion is the mixture of law and fact, and the lack of a distinction, lucidly and emphatically expressed, between what is matter of strict law, and what is matter of judicial discretion. Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court. *Bundy v. Hyde*, 50 N. H. 116, 120. And a close attention to the difference between fact and law, and the difference between an exercise of judicial discretion (unfortunately so called) and a decision of a question of law, will remove much of the obscurity in which the subject of relevancy of evidence has been involved.

“The pleadings at common law are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side and denied on the other, called the *issue*. If it is a proposition of fact, it is to be tried by the jury upon the evidence adduced. And it is an established rule, which we state as the FIRST RULE governing in the production of evidence, that the *evidence offered must correspond with the allegations, and be confined to the point in issue*. This rule supposes the allegations to be material and necessary.” 1 Greenl. Ev., § 51. “It is not necessary, however, that the evidence should bear *directly* upon the issue. It is admissible if it *tends* to prove the issue, or constitutes a link in the chain of proof, although, alone, it might not justify a verdict in accordance with it.” 1 Greenl. Ev., § 51, *a*. “This rule excludes all evidence of *collateral facts*, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and, moreover, the adverse party, having had no

notice of such a course of evidence, is not prepared to rebut it. *
* * This rule is adhered to, even in the cross-examination of witnesses,—the party not being permitted, as will be shown hereafter, to ask the witness a question in regard to a matter not relevant to the issue, for the purpose of afterward contradicting him.” 1 Greenl. Ev., § 52. “The reasons of this rule have been already intimated. If it were not so, the true merits of the controversy might be lost sight of in the mass of testimony to other points, in which they would be overwhelmed; the attention of the jury would be wearied and distracted; judicial investigations would become interminable; the expenses might be enormous; and the character of witnesses might be assailed by evidence which they could not be prepared to repel. It may be added, that the evidence not being to a material point, the witness could not be punished for perjury, if it were false.” 1 Greenl. Ev., § 448. “In cross-examinations, however, this rule is not usually applied with the same strictness as in examinations-in-chief; but, on the contrary, great latitude of interrogation is sometimes permitted by the judge, in the exercise of his discretion. * * * But it is a well-settled rule, that a witness *cannot be cross-examined as to any fact, which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony.*” 1 Greenl. Ev., § 449.

Such an explanation of the law as that contained in these extracts from Greenleaf is less satisfactory and useful than it would be if the distinction between the law and the fact of the subject were more clearly presented.

In *State v. Knapp*, 45 N. H. 148, 149, 154, “There was considerable evidence tending to show that respondent was, at the time of the alleged rape, and, for the last fifteen years or more, had been, a man of more than ordinary strength. It was in evidence that he had taken a barrel of flour up in his hands before him and carried it several rods, and then down several stairs or steps into a cellar; also, that he had, within a few years, carried a barrel of sugar some ten rods on his shoulder, and then set it down on a platform; and of his putting one or more Frenchmen out of his tavern-house in Warren, and the circumstances under which it was done. One Getchel testified that he was present on both occasions, and saw Knapp carry the barrel of flour and of sugar; and he was allowed to state, subject to defendant’s exception, that Knapp ‘seemed to carry them

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easily.' One Glazier, a witness for the State, was allowed to state, subject to defendant's exception, that about fifteen years ago, he had an encounter or contest with defendant at a town-meeting at the meeting-house in Haverhill, which he described, in which Knapp overcame his strength and pushed him (the witness) through the aisle of the meeting-house. Witness also testified that he had lifted upon scales with others the last fall, upon a trial of strength, and stated the amount he was able to lift in that way. He also testified that he should call Knapp a very active man; that he had seen him load wood upon the cars, and had assisted him one day in loading three cars of wood. One Whicher was allowed to state, subject to the defendant's exception, that he had a scuffle with Knapp some six or seven years ago, and to describe it, in which he said that Knapp was too much for him. Witness also stated his own weight at 165 or 170 pounds, and was allowed to state, as tending to show his own strength, how much he had lifted upon a trial of strength with others, some nine years ago. One Eben Swain was allowed to state, subject to defendant's exception, that one year ago last fourth of July there was a scuffle at the house on the top of Moosehillock, in which some men were making disturbance, and that Knapp, being called on by the keeper of the house to assist him, put one of the men engaged in making the disturbance out of the house, describing the man, and the manner in which he was put out."

The court, overruling these exceptions, said, — "The testimony of Glazier and others, as to the exhibitions of strength by respondent in his encounters with others, we think was admissible. It is true that the strength put forth on those occasions was not capable of exact measurement, as in the case of raising a known weight; but it might, nevertheless, afford better means of judging of his capacity of overcoming such resistance as the prosecutrix might have offered, especially when the size and strength of the persons with whom he struggled was shown. Of course, such testimony would not show respondent's exact strength, but it might tend legitimately to show that he possessed ordinary or more than ordinary strength; and the court could not say that to make out either would not be material. How far back the parties should be allowed to go, in the introduction of such testimony, is within the discretion of the judge who tries the cause."

In the trial of that case, the judge, in the exercise of what is called judicial discretion, allowed the parties to go back fifteen

years; and if he had allowed them to go back sixteen years, or only fourteen, no question of law would have arisen as to the proper length of time. During a period of fifteen years in the life of an active man, his exhibitions of strength or weakness might furnish several thousand issues that would be collateral in a certain sense. But evidence of the defendant's strength, shown by experiment, was relevant, and not collateral in the legal sense, because, although it might be rebutted by other evidence of various kinds, it tended to show whether he could commit the crime of which he was accused, and, therefore, bore upon one branch of the question, whether it was likely he had committed it. The general relevancy of that class of evidence was matter of law. But how far back in the history of his life it was advisable to go for the experimental knowledge of his strength was a question of fact, to be determined upon a variety of considerations, some of which are erroneously given in the books as reasons for the exclusion of irrelevant or collateral evidence as a matter of law. The decision of this question of fact was, in the peculiar and technical language of the law, an exercise of judicial discretion. "What are the boundaries, as to distance of time and locality, between that which may shed some light upon the issue, and that which is too remote to be useful," must often be a question of fact for "the judge who tries the cause to determine, under the circumstances of the particular case," "and no positive rule can be laid down" for the decision of such a question. *Cross v. Wilkins*, 43 N. H. 332, 334; *Pomeroy v. Bailey*, id. 118, 125; *Kelsea v. Fletcher*, 48 id. 282, 284; *Holyoke v. G. T. Railway*, id. 541, 546.

When a trial is likely to be unreasonably protracted by a great number of witnesses impeaching or sustaining the character of other witnesses, the evil is not remedied by any principle of law prescribing the exact number. Many evils of that kind must necessarily be avoided by the judge determining, as a matter of fact, upon the circumstances of the case, where the line of reasonableness is. As to the number of experiments or experiences on many points, collateral in a certain sense, but relevant in the legal sense, it is impossible in the nature of the case for a limit to be fixed as a matter of law. But it does not follow that the law excludes all evidence of which it cannot measure a reasonable quantity.

In *State v. Knapp*, proof of the defendant's strength exhibited in his encounters with other people being relevant, evidence of the

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strength of those other people was relevant, and was admitted. And, as his strength could be shown by the result of his struggles with others, as well as by his lifting a certain number of pounds, so their strength could be shown by the result of their struggles with others, and of these others with others still, and so on indefinitely.

How far it would be proper to go in that direction, would be a question of fact. Of whatever degree of remoteness such evidence might be, it would be theoretically and strictly relevant, even if practically worthless.

“Arguments upon evidence are generally arguments from effects to causes; and in proportion as the number of possible causes of a given effect increases, the force of the argument is diminished. It is impossible to fix the precise point at which the argument becomes so weak as not to be worth noticing. One reason why little has been done toward fixing such a point is, that, unless evidence is very strong, it is not worth while either to bring it forward, or to object to its being given. Hence, many things are given in evidence which might, perhaps, be excluded, and many things are omitted, which might, perhaps, be given in evidence.” J. F. Stephen’s Cr. Law, 307. Another reason why little has been done to fix such a point is, the mixture of law and fact, the confounding of remoteness of kind with remoteness of degree, and the want of a broad distinction between what can be settled as a question of law by a general rule, and what should be settled as a question of fact by the circumstances of each case. *Standish v. Washburn*, 21 Pick. 237.

If, on the question of the defendant’s strength, in *State v. Knapp*, the State had offered evidence of his having often committed, upon various persons, the crime of which he was accused, such evidence would have been quite as relevant in kind, quite as free from the objection of being collateral in quality, and much more pertinent and material in degree, than the proof of his carrying a barrel of flour or sugar, or putting Frenchmen out of his tavern, or pushing Glazier through the aisle of a meeting-house at a town meeting, or putting a disorderly man out of a house on the top of Moosehillock mountain on the fourth of July. But if there had been any such evidence, it would not have been offered, because it is understood that such evidence is incompetent. It is sometimes erroneously supposed that such evidence is excluded because it is collateral. The true reason seems to be, the exception (established by ancient English, and adopted without due consideration by modern American

authorities), which excludes evidence of a prisoner's character and disposition for the commission of such a crime as that alleged in the indictment on which he is being tried, and the fact that, although the courts, who introduced the exception, might trust themselves to weigh evidence of other crimes, solely on the question of physical strength, or other question on which it might be competent, they would not trust juries. And yet juries have been trusted in such matters. *State v. Wentworth*, 37 N. H. 196, 211 (where it is held that the commission of other crimes like the one charged, showed that the defendants "had the strength and ability" to commit the crime alleged in the indictment); J. F. Stephen's Cr. Law, 308. Whether the authorities can or cannot be reconciled; whether the exception, excluding relevant evidence of character, did or did not originate in the compassionate inclination of courts to nullify temporary statute provisions of capital punishment for one hundred and sixty "actions which men are daily liable to commit;" and whether the exception should or should not be extended from the character of men to the character of brutes, or to any case where human life is not at stake (*E. Kingston v. Towle*, 48 N. H. 57, 65; *Wilbur v. Hubbard*, 35 Barb. 303; *Scribner v. Kelley*, 38 Barb. 14; *Todd v. Rowley*, 8 Allen, 51), it is evident that the exception, not being sufficiently emphasized as an exception, and a very peculiar one, has produced much confusion by seeming to countenance the idea that the law has an antipathy against experimental knowledge in general.

5. The very few authorities, tending to sustain the exclusion of the fright of Fletcher's horse in this case, are based upon the authority or the reason of the decision in *Collins v. Dorchester*, 6 Cush. 396, and two other Massachusetts cases which rest upon that case. In this State the weight of such authorities is much less than it would be if our general doctrines of the highway liability of towns were more in harmony with those of Massachusetts than they are. There is unfortunately such a difference, that, on this subject, we cannot avail ourselves of the great aid which we derive from the Massachusetts reports on other subjects. Perhaps the difference is decreasing, but it has been very marked. *Howard v. N. Bridgewater*, 16 Pick. 189; *Shepardson v. Colerain*, 13 Metc. 55; *Stanton v. Springfield*, 12 Allen, 566; *Nason v. Boston*, 14 id. 508; *Luther v. Worcester*, 97 Mass. 268; *Stone v. Hubbardston*, 100 id. 49; *Gilbert v. Roxbury*, id. 185; *Billings*

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v. Worcester, 102 id. 329; *Stickeney v. Salem*, 3 Allen, 374; *Blodgett v. Boston*, 8 id. 237; *Hamilton v. Boston*, 14 id. 475; *Fogg v. Nahant*, 98 Mass. 578; *Babson v. Rockport*, 101 id. 93; *Southworth v. O. C. & N. R. Co.*, 105 id. 342; *Drake v. Lowell*, 13 Mete. 292; *Hixon v. Lowell*, 13 Gray, 59; *Day v. Milford*, 5 Allen, 98; *Jones v. Boston*, 104 Mass. 75.

So different are the views prevailing in the two States, that, in such cases as the present, it is held in Massachusetts that an object in a highway outside of the traveled path, likely to frighten horses, is not, on that account, a defect. *Keith v. Easton*, 2 Allen, 552; *Kingsbury v. Dedham*, 13 id. 186; *Horton v. Taunton*, 97 Mass. 266; *Cook v. Charlestown*, 98 id. 80.

The three Massachusetts cases, cited to sustain the ruling in this case, must be considered in connection with other Massachusetts decisions which hold that, on the question whether the town could have removed certain ice from a sidewalk by the use of reasonable means, the plaintiff may show that, in the vicinity, ice had been removed from the sidewalk with a shovel (*Shea v. Lowell*, 8 Allen, 136), and that the town may show that other roads were like the road complained of "as bearing upon the question of ordinary care" (*Raymond v. Lowell*, 6 Cush. 524, 531; *Paskard v. New Bedford*, 9 Allen, 200), but not as bearing on the question whether the road complained of was safe and convenient. *Kilder v. Dunstable*, 11 Gray, 342.

A consideration, substantially disposing of the very few authorities that have any considerable tendency to sustain the ruling in this case, is, that *Collins v. Dorchester*, on which the others are based, is no authority for the exceptional doctrine it has been supposed to establish. That case being no foundation for the others, and they having no other foundation, they all fall together: In that case, "the highway in question passed through a marsh, and was made smooth and passable for the width of at least thirty-one feet; and, on each side, at the edge of and along the road, there was a row of posts about six feet apart, extending on each side for twenty rods or more, which had been standing for many years. The plaintiff drove his chaise against one of the posts, so that one wheel passed outside of and locked upon the post; and this accident was the occasion of the injury complained of. It appeared that two or three of the posts, at about the place where the accident occurred, were broken down or removed. The alleged defect was

the want of a railing at the place where the accident occurred. * * * The plaintiff * * * proposed to prove by one Sprague, that, before the happening of the accident complained of, the witness was riding over the same road, at or near the same place, and under similar circumstances, and that an accident similar to the one in question then occurred, which was caused by the same alleged defect, and without any neglect or fault on the part of the witness." The judge ruled that this evidence was not competent "for the purpose of proving the way defective." The whole of the decision of the question raised by that ruling was this: "The testimony of Sprague, that he, before the injury complained of by the plaintiff, received a similar injury, at or near the same place, without any negligence on his part, was not competent for the purpose of proving that the road was defective at the time and in the place of the plaintiff's injury. It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet. *Standish v. Washburn*, 21 Pick. 237; 2 Stark. Ev. 381, *et seq.*; 1 Greenl. on Ev., §§ 52, 448. Even a judgment recovered by Sprague against the defendants for damages sustained by him by reason of a defect in the road, would not be admissible in evidence in favor of the plaintiff."

In that case, a sufficient railing on the posts would have prevented the plaintiff's wheel going outside of the post with which his carriage came in contact. The question was, whether, in the undisputed condition of the road, the absence of such a railing, exposing travelers to the danger of their wheels going outside of and looking upon the posts, was a defect. No experiment or experience of the plaintiff, or Sprague, or any one else, was necessary to show that the posts were capable of being run against. It does not appear that any such experiment or experience would assist the judgment of the jury on the question whether, in the undisputed condition of the road, the posts were likely to be run against. Such a case is no authority for holding that the disputed horse-frightening capacity of a certain pile of lumber cannot be shown by experience.

In *Aldrich v. Pelham*, 1 Gray, 510, it was held that the case could not be distinguished from *Collins v. Dorchester*, and that consequently the disputed width of a road could not be shown by a measurement of it made with carriages, although it might be shown

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by some other kind of measurement. In *Kidder v. Dunstable*, 11 Gray, 342, it was held, as a point settled by *Collins v. Dorchester* and *Aldrich v. Pelham*, that the disputed width of a path could not be shown by a measurement of it made with sleighs.

In *Collins v. Dorchester*, an experiment was not necessary to prove an undisputed fact. In *Aldrich v. Pelham* and *Kidder v. Dunstable* it was considered settled by *Collins v. Dorchester* that a disputed fact could not be proved by experiment. In this view of the unsound foundation of authorities tending to sustain the ruling in this case, they cannot be regarded as of great weight.

In an action on a note alleged to have been given for money loaned, the defense being that the note is a forgery and the loan a fiction, evidence tending to show the payee's want of means to make the loan, and evidence tending to show that the payer was a borrower of money, is admissible. *Wiggin v. Plumer*, 31 N. H. 251, 255, 268, 269, 270; *Demeritt v. Miles*, 22 id. 523, 528; *Angier v. Ash*, 26 id. 99, 110. On the question, what price A agreed, by an express verbal contract, to pay B for drawing certain lumber over a particular route, the prices paid by other people to other people for similar services are admissible, as bearing upon the probabilities of the case. *Swain v. Cheney*, 41 N. H. 232. On the question, whether a building was set on fire by sparks from particular locomotive engines, evidence that sparks were thrown from other engines may be competent. *Boyce v. Cheshire Railroad*, 43 N. H. 627. A surgeon undertakes to treat his patients with a reasonable degree of skill, and in an action against him for malpractice, upon the question of skillful or unskillful treatment, evidence is admissible to show what degree of skill he was possessed of—in other words, to show his surgical ability. *Leighton v. Sargent*, 27 N. H. 460. At the second trial of that case, "The defendant proposed to offer evidence of surgical cases treated by him as showing his skill. But these cases having occurred a little more than two years after the time of the treatment of the plaintiff's case, and eight or ten months after the commencement of this suit, the court, therefore, rejected the evidence."

Upon an exception taken to the exclusion of that evidence, the decision was this: "The evidence proposed to be given of cases in surgery actually treated by the defendant, as showing his skill, was properly rejected. The cases occurred two years after the case in question, and, even if he were then as skillful as the rule of law

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requires, it would not legitimately show that he was so skilled at the date of the act complained of in this case. Skill, possessed two years subsequently to the time of the act complained of, does not presuppose a like degree of skill at its date." The question of admitting the evidence turned on the point of time, and was a question of fact.

We have carefully examined such authorities as our attention has been called to, some of the most important of which are *Hubbard v. Concord*, 35 N. H. 52 (where evidence of other people slipping on the ice complained of, was, on the authority of *Collins v. Dorchester*, and *Aldrich v. Pelham*, held incompetent by one of the two judges sitting in the case, the judge who delivered the judgment yielding his own opinion to avoid the consequence of an equal division, and in deference to his senior associate by whom the point was not thoroughly examined, and where their attention was chiefly occupied by "other more important question"); *Hubbard v. A. & K. R. Co.*, 39 Me. 506; *Hill v. P. & R. R. Co.*, 55 id. 438; *Kent v. Lincoln*, 32 Vt. 591; *Walker v. Westfield*, 39 id. 246; *House v. Metcalf*, 27 Conn. 631; *Bailey v. Trumbull*, 31 id. 581, 584; *Calkins v. Hartford*, 33 id. 57; *Crafter v. The M. R. Co., L. R.*, 1 C. P. 303; *Sherman v. Kortright*, 52 Barb. 267; *T. H. Association v. Giles*, 33 N. J. 260; and have come to the conclusion that, in this case, the exclusion of the evidence on the ground of its incompetency as a matter of law, cannot be sustained.

Verdict set aside.

McDUFFEE V. THE PORTLAND & ROCHESTER RAILROAD.

(53 N. H. 420.)

Common carrier — discrimination in carriage of freight — action for.

Where an action was brought against a railroad company for an alleged unjust discrimination in favor of an express company, by affording better and extra facilities to it for transportation than to the plaintiff, and the defendant demurred — *Held*, that an action would lie for damage caused by such discrimination; and also, *held*, that though the unreasonable preference was practiced in another State, if in violation of the law thereof, the action would still lie. (See note, p. 87.)

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CASE by Daniel McDuffee against The Portland & Rochester R. R., for not furnishing to the plaintiff, for his express business, on its line between Rochester, N. H., and Portland, Me., reasonably equal terms, facilities and accommodations to those granted and allowed by the company to the Eastern Ex. Co.

The defendants interposed a demurrer to plaintiff's declaration.

Sanborn & Small, for defendants.

Worcester & Gaffney and *Mr. Frank Hobbs*, for plaintiff.

DOE, J. I. A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. *Sandford v. R. Co.*, 24 Penn. St. 378, 381; *N. J. S. N. Co. v. Merchants' Bank*, 6 How. 344, 382; *Shelden v. Robinson*, 7 N. H. 157, 163, 164; *Gray v. Jackson*, 51 id. 9, 10; *Ansell v. Waterhouse*, 2 Chitty, 1, 4; *Hollister v. Nowlen*, 19 Wend. 234, 239. He is under a legal obligation; others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right. "There are certain cases, in which, if individuals dedicate their personal services, or the temporary use of their property, to the public, the law will impose certain duties upon them, and regulate their proceedings to a certain extent. Thus, a common carrier is bound by law, if he have conveniences for the purpose, to carry for a reasonable compensation." *Olcott v. Banfill*, 4 N. H. 537, 546. "He [the common carrier] holds a sort of official relation to the public. He is bound to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow. He cannot refuse to carry a proper article, tendered to him at a suitable time and place, on the offer of the usual reasonable compensation. Story on Bailments, § 508; *Riley v. Horne*, 5 Bing. 217, 224; *Bennett v. Dutton*, 10 N. H. 486. When he undertakes the business of a common carrier, he assumes this relation to the public, and he is not at liberty to decline the duties and responsibilities of his place, as they are defined and fixed by law." *Moses v. B. & M. R. R.*, 24 N. H. 71, 88, 89. On this ground, it was held, in that case, that a common carrier could not, by a public notice, discharge himself from the legal responsibility pertaining to his office, or from performing his public duty in the way and on the terms prescribed by law.

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“The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application.” *N. E. Express Co. v. M. C. R. R. Co.*, 57 Me. 188, 196. A common carrier of passengers cannot exercise an unreasonable discrimination in carrying one and refusing to carry another. *Bennett v. Dutton*, 10 N. H. 481. A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public, if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common-carrier transportation. With such a power, he would be a carrier, — a special, private carrier, but not a common, public one. From the public service — which he entered of his own accord — he may retire, ceasing to be a common carrier, with or without the public consent, according to the law applicable to his case; but, as long as he remains in the service, he must perform the duties appertaining to it. The remedies for neglect or violation of duty in the civil service of the State are not the same as in the military service; but the public rights of having the duties of each performed are much the same, and, in the department now under consideration, ample remedies are not wanting. The right to the transportation service of a common carrier is a common as well as a public right, belonging to every individual as well as to the State. A right of conveyance, unreasonably and injuriously preferred and exclusive, and made so by a special contract of the common carrier, is not the common, public right, but a violation of it. And when an individual is specially injured by such a violation of the common right which he is entitled to enjoy, he may have redress in an action at common law. The common carrier has no cause to complain of his legal responsibility. It was for him to consider as well the duty as the profit of being a public servant, before embarking in that

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business. The profit could not be considered without taking the duty into account, for the rightful profit is the balance of compensation left after paying the expenses of performing the duty. And he knew beforehand, or ought to have known, that, if no profit should accrue, the performance of the duty would be none the less obligatory until he should be discharged from the public service *Taylor v. Railway*, 48 N. H. 304, 317. The chances of profit and loss are his risks, being necessary incidents of his adventure, and for him to judge of before devoting his time, labor, care, skill and capital to the service of the county. Profitable or unprofitable, his condition is that of one held to service, having, by his own act, of his own free will, submitted himself to that condition, and not having liberated himself, nor been released, from it.

A common carrier cannot directly exercise unreasonable discrimination as to whom and what he will carry. On what legal ground can he exercise such discrimination indirectly? He cannot, without good reason, while carrying A, unconditionally refuse to carry B. On what legal ground can he, without good reason, while providing agreeable terms, facilities and accommodations for the conveyance of A and his goods, provide such disagreeable ones for B that he is practically compelled to stay at home with his goods, deprived of his share of the common right of transportation? What legal principle, guarantying the common right against direct attack, sanctions its destruction by a circuitous invasion? As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy or unprofitable, so a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities or accommodations which would practically amount to an embargo upon the travel or traffic of some disfavored individual. And, as all common carriers combined cannot, directly or indirectly, destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together, nor one alone, can, directly or indirectly, deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoy-

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ment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities or accommodations. That is not, in the ordinary legal sense, a public highway, in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and that is not a public service of common carriage, in which one enjoys an unreasonable preference or advantage, and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service by a refusal to carry differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities or accommodations. Whether the denial is general by refusing to furnish any transportation whatever, or special by refusing to carry one person or his goods; whether it is direct by expressly refusing to carry, or indirect by imposing such unreasonable terms, facilities or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities or accommodations operate as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities or accommodations, or in their discriminating, collective and comparative character — the right denied is one and the same common right, which would not be a right if it could be rightly denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination, and parceled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due.

The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practiced by a carrier held to the common service, is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value of certain transportation of 100 barrels of flour, affording a reasonable profit to the carrier, is \$100; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroach-

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ment on the common right. But if, for that service, the carrier charges one flour merchant \$100, and another \$50, the common right is as manifestly violated as if the latter were charged \$100 and the former \$200. What kind of a common right of carriage would that be which the carrier could so administer as to unreasonably, capriciously, and despotically enrich one man and ruin another? If the service or price is unreasonable and injurious, the unreasonableness is equally actionable, whether it is in inequality, or in some other particular. A service or price that would otherwise be reasonable, may be made unreasonable by an unreasonable discrimination, because such a discrimination is a violation of the common right. There might be cases where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where the discrimination would be injurious: in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continued grievance, or for other reasons; in such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar, and appropriate course of law.

The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service, or a reasonable price, which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general principle of reasonable equality which distinguishes the duty of a common carrier, in the legal sense, from the duty of a carrier who is not a common one in that sense. A certain inequality of terms, facilities, or accommodations may be reasonable, and required by the doctrine of reasonableness, and, therefore, not an infringement of the common right. It may be the duty of a common carrier of passengers to carry under discriminat-

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ing restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers; and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations, if they were there unreasonably and negligently exposed, by the carrier, to the society of small-pox patients. Sober, quiet, moral, and sensitive travelers may have cause to complain of their accommodations, if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodations; in another sense, they would not. The feelings not corporal, and the decencies of progressive civilization, as well as physical life, health, and comfort, are entitled to reasonable accommodations. 2 Greenl. Ev., § 222 a; *Bennett v. Dutton*, 10 N. H. 481, 486. Mental and moral sensibilities, unreasonably wounded, may be an actual cause of suffering, as plain as a broken limb; and, if the injury is caused by unreasonableness of facilities or accommodations (which is synonymous with unreasonableness of service), it may be as plain a legal cause of action as any bodily hurt, commercial inconvenience, or pecuniary loss. To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life and the common sentiments of mankind, may be as clear a violation of the common right and as clear an actionable neglect of a common carrier's duty, as to permit one to occupy two seats while another stands in the aisle. Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one; and the law does not require a court or jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main question is, not whether the unreasonableness was in this or in that, but whether there was unreasonableness, and whether it was injurious to the plaintiff.

This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A

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receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as his enjoyment of the common right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. 'There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is \$100, and his just profit, not needed in his business, is one-tenth of that sum, he has \$10 which he may legally use for feeding the hungry, clothing the naked, or carrying those in poverty, to whom transportation is one of the necessities of life, and who suffer for lack of it. But if he charges the \$10 to those who pay him for their transportation, if he charges them \$110 for \$100 worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service; he is violating the common right of reasonable terms, which cannot be increased by compulsory contributions for any charitable purpose. So, if he carries one or many for half the reasonable price, and reimburse himself by charging others more than the reasonable price, he is illegally administering, not his own, but other people's charity. And when he attempts to justify an instance of apparent discrimination on the ground of charity, it may be necessary to ascertain whose charity was dispensed—whether it was his, or one forced by him from others, including the party complaining of it. But it will not be necessary to consider this point further, until there is some reason to believe that what the plaintiff complains of is defended as an act of disinterested benevolence performed by the railroad at its own expense.

In *Garton v. B. & E. R. Co.*, 1 B. & S. 112, 154, 165, when it was not found that any unreasonable inequality had been made by the defendants to the detriment of the plaintiffs, it was held that a reas-

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enable price paid by them was not made unreasonable by a less price paid by others — a proposition sufficiently plain, and expressed by CROMPTON, J., in another form, when he said to the plaintiffs' counsel during the argument of that case: "The charging another person too little is not charging you too much." The proposition takes it for granted that it has been settled that the price paid by the party complaining was reasonable — a conclusion that settles the whole controversy as to that price. But before that conclusion is reached, it may be necessary to determine whether the receipt of a less price from another person was a matter of charity, or an unreasonable discrimination and a violation of the common right. Charging A less than B for the same service, or service of the same value, is not of itself necessarily charging A too little, or charging B too much; but it may be evidence tending to show that B is charged too much, either by being charged more than the actual value of the service, or by being made the victim of an unjustifiable discrimination. The doctrine of reasonableness is not to be overturned by a conclusive presumption that every inequality of price is the work of alms-giving, dictated by a motive of humanity. If an apparent discrimination turns out, on examination, to have been, not a discrimination in the performance of the public duty, but a private charity, there is an end of the case. But if an apparent discrimination is found to have been a real one, the question is whether it was reasonable, and, if unreasonable, whether the party complaining was injured by it.

In some cases, this may be an inquiry of some difficulty in each of its branches. But such difficulty as there may be will arise from the breadth of the inquiry, the intricate nature of the matter to be investigated, the circumstantial character of the evidence to be weighed, and the application of the legal rule to the facts, and not from any want of clearness or certainty in the general principle of the common law applicable to the subject. The difficulty will not be in the common law, and cannot be justly overcome by altering that law. The inquiry may sometimes be a broad one, but it will never be broader than the justice of the case requires. A narrow view that would be partial, cannot be taken; a narrow test of right and wrong that would be grossly inequitable, cannot be adopted. If the doctrine of reasonableness is not the doctrine of justice, it is for him who is dissatisfied with it to show its injustice; if it is the

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doctrine of justice, it is for him to show the grounds of his discontent.

The decision in *N. E. Express Co. v. M. C. R. Co.*, 57 Me. 188, satisfactorily disposed of the argument, vigorously and ably pressed by the defendants in that case, that a railroad, carrying one expressman and his freight on passenger trains, on certain reasonable conditions, but under an agreement not to perform a like service for others, does not thereby hold itself out as a common carrier of expressmen and their freight on passenger trains, on similar conditions. So far as the common right of mere transportation is concerned, and without reference to the peculiar liability of a common carrier of goods as an insurer, such an arrangement would, necessarily and without hesitation, be found, by the court or the jury, to be an evasion. A railroad corporation, carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle, which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one, and is in no danger of being destroyed by a quibble. If there could possibly be a case in which the exclusive arrangement in favor of one expressman would not be an evasion of the common-law right, the question might arise whether, under our statute law (Gen. Stats., chs. 145, 146, 149, 150), public railroad corporations are not common carriers (at least to the extent of furnishing reasonable facilities and accommodations of transportation on reasonable terms) of such passengers and such freight as there is no good reason for their refusing to carry.

The public would seem to have reason to claim, that the clause of Gen. Stats., ch. 146, § 1 ("Railroads being designed for the public accommodation, like other highways, are public"), is a very comprehensive provision; that public agents, taking private property for the public use, are bound to treat all alike (that is, without unreasonable preference), so far as the property is used, or its use is rightfully demanded, by the public for whose use it was taken; and that, in a country professing to base its institutions on the natural equality of men in respect to legal rights and remedies, it cannot be presumed that the legislature intended, in the charter of a common carrier, to grant an implied power to create monopolies in the

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express business, or in any other business, by undue and unreasonable discriminations.

There would seem to be a great doubt whether, upon any fair construction of general or special statutes, a common carrier, incorporated in this country, could be held to have received from the legislature the power of making unreasonable discriminations and creating monopolies, unless such power were conferred in very explicit terms. And, if such power were attempted to be conferred, there would be, in this State, a question of the constitutional authority of the legislature to convey a prerogative so hostile to the character of our institutions and the spirit of the organic law. But, resting the decision of this case, as we do, on the simple, elementary, and unrepealed principle of the common law, equally applicable to individuals and corporations, we have no occasion, at present, to go into these other inquiries.

We might have safely rested our opinion on the authority of *N. E. Express Co. v. M. C. Railroad Co.*, 57 Me. 188; *Sandford v. Railroad Co.*, 24 Penn. St. 378; *C. B. & Q. Railroad Co. v. Parks*, 18 Ill. 460, 464, and 2 Redfield Am. R. R. Cases, 71. But it seemed desirable that it should be distinctly founded on a general and fundamental principle, which does not need the support of, and could hardly be shaken by, decided cases. We have carefully examined *F. Railroad Co. v. Gage*, 12 Gray, 393, and have not overlooked the fact that, in England, it seems to be supposed that, at common law, common carriers are not bound to carry all and for all on reasonably equal terms. *Baxendale v. E. C. R. Co.*, 4 C. B. (N. S.) 63; *Branley v. S. E. R. Co.*, 12 id. 63, 75. The position of the English law appears to be plain and instructive. The principal English cases usually cited are *Pickford v. G. J. R. Co.*, 10 M. & W. 399; S. C. in Equity, 3 Eng. Railway and Canal Cases, 538; *Parker v. G. W. R. Co.*, 7 M. & G. 253; *Crouch v. L. & N. W. R. Co.*, 2 C. & K. 789; *Parker v. G. W. R. Co.*, 11 C. B. 545; *Edwards v. G. W. R. Co.*, 11 id. 588; *Crouch v. L. & N. W. R. Co.*, 14 id. 255; *Crouch v. G. N. R. Co.*, 9 W. H. & G. 556; *Finnie v. G. & S. W. R. Co.*, 2 Macqueen H. of L. Cas. 177; S. C., 34 Eng. L. and Eq. 11; *Crouch v. G. N. R. Co.*, 11 H. & G. 742; *Barker v. M. R. Co.*, 18 C. B. 46; *Parker v. G. W. R. Co.*, 6 E. & B. 77; *Caterham R. Co. v. L. B. & S. C. R. Co.*, 1 C. B. (N. S.) 410; *Barret v. G. N. R. Co.*, id. 423; *Ransome v. E. C. R. Co.*, id. 437; *Oxlade v. N. E. R. Co.*, id. 454; *Marriott v. L. & S. W. R. Co.*, id. 499; *Beadell v. E. C. R. Co.*, 2 C.

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B. (N. S.) 509; *Painter v. L. B. & S. C. R. Co.*, id. 702; *Baxendale v. N. D. R. Co.*, 3 id. 324; *Harris v. C. & W. R. Co.*, id. 693; *Jones v. E. C. R. Co.*, id. 718; *Baxendale v. E. C. R. Co.*, 4 id. 63; *Ransome v. E. C. R. Co.*, id. 135; *Cooper v. L. & S. W. R. Co.*, id. 738; *Piddington v. S. E. R. Co.*, 5 id. 111; *Baxendale v. G. W. R. Co.*, id. 309, 336; *Nicholson v. G. W. R. Co.*, id. 366; *Garton v. G. W. R. Co.*, id. 669; *Garton v. B. & E. R. Co.*, 4 H. & N. 33; *Garton v. B. & E. R. Co.*, 6 C. B. (N. S.) 639; *Bennett v. M. S. & L. R. Co.*, id. 707; *Nicholson v. G. W. R. Co.*, 7 id. 755; *Ransome v. E. C. R. Co.*, 8 id. 709; *Garton v. B. & E. R. Co.*, 1 B. & S. 112; *Baxendale v. B. & E. R. Co.*, 11 C. B. (N. S.) 787; *Branley v. S. E. R. Co.*, 12 id. 63; *Baxendale v. L. & S. W. R. Co.*, id. 758; *Baxendale v. G. W. R. Co.*, 14 id. 1; *Baxendale v. G. W. R. Co.*, 16 id. 137; *Sutton v. G. W. R. Co.*, 3 H. & C. 800; *Baxendale v. L. & S. W. R. Co.*, L. R., 1 Exch. 137; S. C., 4 H. & C. 130; *Palmer v. L. & S. W. R. Co.*, L. R., 1 C. P. 588; *West v. L. & N. W. R. Co.*, L. R., 5 C. P. 622; *Palmer v. L. B. & S. C. R. Co.*, L. R., 6 C. P. 194; *Parkinson v. G. W. R. Co.*, id. 554.

These cases seem to be based on statutes general or special. The English parliament has been extremely vigilant and industrious in putting, in the charters of corporations, provisions for the protection of the rights of individuals and the public. Out of abundant caution, and for the information of those specially concerned, and to guard against any possible construction by implication repealing the common law, they affirmed some of its simplest rules. *Sandford v. Railroad Co.*, 24 Penn. St. 378. In charters of common carriers, what is called the equality clause was inserted, requiring the carriers to furnish transportation on equal terms. The fashion of legislation once set, was studiously followed with a degree of reverence for precedent that does not prevail in this country. General statutes were passed, enacting the common-law doctrine of reasonable equality, and new methods of enforcing it were introduced. And the practice of the English courts, on charters and general acts of this kind, has been so long continued, that the fact seems now to be overlooked that the general principle of equality is the principle of the common law. With so much legislation on the subject as there has been in that country, and so much litigation upon acts of parliament, it was not strange that the bar and bench should finally lose sight of the common-law origin of the principle so many times enacted in different forms, and

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carried out in different methods prescribed by parliament. It seems to have been a result of the anxiety of parliament, that, instead of merely providing such new remedies and modes of judicial procedure as they deemed necessary for the enforcement of the common law, they repeatedly re-enacted the common law, until it came to be supposed that, in such an important matter as the public service of transportation by common carriers, the public were indebted, for the doctrine of equal right, to the modern vigilance of parliament, instead of the system of legal reason which had been the birthright of Englishmen for many ages. A mistake of this kind is an evil of some magnitude. It unjustly weakens the confidence of the community in the wisdom and justice of the ancient system, and impairs its vigor. When the understanding prevails that equality, in a branch of the public service so vast as that of transportation by common carriers, depends upon the action of a legislature declaring it by statute, and attempting the difficult task of accurately expressing the whole length and breadth of the doctrine in words not defined in the common law, public and common rights of immense value are removed from a natural, broad, and firm foundation, to one that is artificial and narrow, and consequently less secure; and many results of ill consequence flow from such a misconception of the free institutions of the common law.

English cases, based on statutes passed in affirmance of the common law, are precedents and authorities on the reasonableness of common carriers' discriminations that may be useful in this country. Even if it should be found that, in those cases, a question of fact is sometimes decided as a question of law, or that, in cases tried by the court without a jury, the distinction between law and fact is sometimes lost, the decisions may still, for some purposes, be of material value. But the common-law rule of equal right and reasonableness is the ground on which we stand. "Common," in its legal sense, used as the description of the carrier and his duty and the correlative right of the public, contains the whole doctrine of the common law on the subject. The defendants are common carriers. That is all that need be said. All beyond that can be no more than an explanation or application of the legal meaning of "common" in that connection.

II. The views already stated necessarily lead to the opinion that the equality clause of section 2, chapter 149, Gen. Stats., requiring that all persons shall have reasonable and equal terms, facilities and

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accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon any railroad owned or operated in this State, and for the use of the depot and other buildings and grounds, is, so far as it has any application to the present posture of this case, merely declaratory of the common law, which, by section 3 of the same chapter, may be enforced by indictment as well as by suit for damages. Section 4 allows railroads to carry stockholders going to or returning from the meetings of the proprietors, persons in charge of mails and expresses, poor persons, and others, without payment of the regular fare. Poor persons, unable to pay the regular fare, may be relieved. As to them the common law is not changed. And the statute, construed by the reason of the common law which it affirms, might well be held to leave the matter of charity to the discretion of the carrier. And, as to matters of business — matters within the public duty of the carrier, and the common rights of mankind — the statute, requiring reasonableness and equality in affirmance of the common law, is to be construed by the reason of the common law, and the whole statute is to be construed together. When section 2 says all persons shall have reasonable and equal terms, and section 4 allows expressmen and others to be carried without payment of the regular fare, both sections, taken together, do not allow any unreasonable discrimination between expressmen, or between any individuals or classes of the human race. The equality clause of the second section is the gist of the statute in relation to discrimination. Sections 4 and 5 are illustrations, showing, to a certain extent, the application of the common-law doctrine of reasonable equality. In regard to the general doctrine, the statute, so far as it goes, is as broad and sweeping as the common law. The persons who are allowed, by section 4, to be carried without payment of the regular fare, can no more be made the subjects of an unreasonable discrimination than they could if that section were not in the statute. The fact that there may be a reasonable discrimination between wholesale and retail prices of transportation of passengers, as well as between wholesale and retail prices of lands or goods, seems to be recognized by the fifth section; but the Eastern Express Company, if they are such a company as their name indicates, are not one of the "other organized companies" alluded to in that section.

III. A part of the defendants' road is in Maine, and a part in New Hampshire. The defendants are, for ordinary practical pur-

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poses, one and the same corporation in each State, and are under the same common-law obligations in each State. We know not how any individuals or corporations of New Hampshire can be aggrieved in such cases as this, if the common law of both States is administered to them by the tribunals of Maine. If it was the opinion of the legislature or the judiciary of Maine that we ought not to take jurisdiction of the plaintiff's complaint of an unreasonable discrimination made by the defendants against the plaintiff on that part of the road situated in Maine, we should endeavor to give no just cause of offense, and to avoid all jurisdictional conflict. And, if it should be found that we had unwittingly encroached upon the sovereignty of another State, we should make haste to retrace our steps. But, as we understand the law of Maine, we are safe in holding that we may take jurisdiction of the whole of the case presented by the plaintiff, in an action at common law. Undoubtedly, on the question of discrimination practiced by the defendants in the performance of their duty in Maine, the rights of the parties are to be determined according to the law of that State. But, with the present system of continuous common carriage among our numerous States, if the remedy were cut in pieces by every State line, in cases of this kind, the evil consequences would be serious, and, as we think, without any legal necessity. Considering this point upon the general doctrine of transitory actions, the generally uniform liability of natural and artificial persons, and the intent of the legislatures of Maine and New Hampshire to create a corporation that might act, and be dealt with, as one and not two, in such matters as those involved in this suit, we see no room for doubt. Angell & Ames on Corporations (4th ed.), §§ 402-407; *Libbey v. Hodgdon*, 9 N. H. 394; *Fuller v. C. & N. W. R. R. Co.*, 31 Iowa, 187; *Fuller v. C. & N. W. R. R. Co.*, id. 211.

IV. The defendants contend that the declaration is bad at common law, because it is not alleged that the defendants were common carriers. It is not so alleged in terms; probably it is so alleged in substance. The objection being one so easily obviated by an amendment alleging, in so many words, that the defendants were common carriers, the plaintiff, having his attention called to a possible motion in arrest of judgment, will undoubtedly guard against danger in that quarter, and avoid an unprofitable and uninteresting question of pleading, by making such an amendment. This being a case, in some respects, of novel impression in this State, the plaintiff's coun

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sel, in drawing the declaration, very prudently referred to the statute, and inserted several counts of considerable length and elaboration. Since we hold that damage suffered by the plaintiff from an unreasonable discrimination made by the defendants between the plaintiff and the Eastern Express Company or any one else, in terms, facilities or accommodations — damage caused by any undue or unreasonable preference or advantage made or given by the defendants, as common carriers, to or in favor of any particular person or company, or caused by any undue or unreasonable prejudice or disadvantage to which the defendants subjected the plaintiff — is a cause of action at common law, a good and sufficient count can easily be drawn for such a cause of action, without reference to the statute. It may be well to employ as much of the phraseology of the statute as possible, and it may not be strictly necessary to insert explicit allegations presenting the case in the exact verbal form in which we have presented it, but the declaration should be made obviously and unquestionably sufficient. The suggestions we have made will enable counsel readily to put it in such form as to avoid every possible objection. Our time is too much needed for the consideration of subjects of some importance, to be properly occupied with an unnecessary and barren question of pleading.

Case discharged.

NOTE. — The question as to the duty of a common carrier, to carry without preference, was considered by the supreme court of Maine in *New England Express Co. v. Maine Central R. R. Co.*, 3 Am. Rep. 81 (57 Me. 188), and it was held, that an agreement by which the defendant, a common carrier, contracted to give to one express company privileges for transporting freight and not to give like privileges to any other person or express carrier, was illegal, and that an express carrier who had been refused facilities for transporting could maintain an action. So in *Messenger v. Pennsylvania R. R. Co.*, 7 Vroom. 407, it was decided by the supreme court of New Jersey that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than they would carry under the same conditions for others, was void as creating an illegal preference. — RMP.

STATE V. OBER.

(53 N. H. 482.)

Witness — privilege of defendant when witness in his own behalf.

Where a criminal upon trial offered himself as a witness in his own behalf and was asked a question, on cross-examination by the State's attorney, which he declined to answer, on the plea that he could not be compelled to furnish evidence against himself, and the State's attorney argued from such declension to the jury under objection by defendant, which the court overruled, and charged the jury that they had the right to consider such declension; *Held*, that the respondent had waived the right claimed when he offered himself for a witness, and that he then became subject to all the rules and tests applicable to any other witness. (*See note, p. 92.*)

INDICTMENT for keeping spirituous liquors for sale found against Everett J. Ober, at April term, 1873. The defendant, on the trial, offered himself as a witness, under Laws 1869, chap. 23, and testified in his own behalf. On his cross-examination the State's attorney asked the question if he had not sold spirituous liquors within one year previous to the indictment. The witness declined to answer under Bill of Rights, art. 15, which is against compelling any person to accuse or furnish evidence against himself. In the closing argument, the counsel for the State insisted that the jury should consider the declining to answer a pertinent matter of evidence against. Defendant's counsel objected; the court allowed him to proceed, and afterward, directly charged the jury that they had the right to consider such declination, as bearing on the question of guilt or innocence of the prisoner, with such weight as they might deem it entitled to. To the charge and ruling, the defendant excepted. The jury found a verdict of guilty, and the case comes up for argument on a bill of exceptions.

Hawthorn & Green, for defendant.

Mr. Flint, for State.

FOSTER, J. The questions are presented, whether a prisoner, who is sworn as a witness at his own request, can be compelled to answer questions, upon his cross-examination, as to facts tending to

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convict him, in relation to which he was not interrogated on his direct examination; and whether, upon being permitted to refuse to answer such questions, upon the ground that his answers might tend to criminate him, such refusals may be commented upon by the State's counsel, and be considered by the jury.

If the ruling that the prisoner had the right to decline answering had been correct, we should agree with his counsel that the subsequent ruling could not be sustained. But the first ruling was not correct. The respondent, by electing to testify in his own favor, waived his constitutional privilege. If he refuses to testify at all, the statute protects him from adverse comment or inference; but, if he avails himself of the statute, he waives the constitutional protection in his favor, and subjects himself to the peril of being examined as to any and every matter pertinent to the issue. This is expressly held in *Com. v. Mullen*, 97 Mass. 545; *Com. v. Bonner*, id. 587; *Com. v. Morgan*, 107 id. 199; *McGarry v. The People*, 2 Lans. 227; and *Connors v. The People*, 50 N. Y. 240, decided in November, 1872, in which CHURCH, C. J., delivering the opinion of the court of appeals, declares the principle controlling the case to be, that, by consenting to be a witness in his own behalf, under the statute, the accused subjected himself to the same rules, and was called upon to submit to the same tests, which could by law be applied to the other witnesses; in other words, if he availed himself of the privilege of the act, he assumed the burdens necessarily incident to the position. The prohibition in the constitution is against compelling an accused person to become a witness against himself. If he consents to become a witness in the case voluntarily, and without any compulsion, it would seem to follow that he occupies, for the time being, the position of a witness, with all its rights and privileges, and subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His own act is the primary cause, and if that was voluntary, he has no reason to complain.

If the respondent had not seen fit to make himself a witness in his own cause, the fact that he did not choose to testify could not have been commented upon by the State's counsel, nor would the jury have been at liberty to draw any inference detrimental to him from his silence. But, when he made himself a witness-in-chief, he subjected himself to the government's right of cross-examination.

By electing to testify, he placed himself in the attitude of any ordinary witness, irrespective of any interest in the cause. As a party, his denial to answer a particular question, on the ground that such answer would tend to criminate him, could afford him no exemption from the inferences which would naturally attach to any other witness, not a party, in such circumstances. *Norfolk v. Gaylord*, 28 Conn. 309.

The fact that he is charged with a crime gives him certain special privileges. Among these are the requirements of the State to prove the charge against him beyond a reasonable doubt; the constitutional prohibition of compelling him to accuse or furnish evidence against himself; the right to meet the witnesses against him face to face, and so forth.

With such exceptional advantages, he stands precisely like a party to a civil cause electing to testify in his own favor, and thereby subjecting himself to the ordinary ordeal of cross-examination, and comment upon his testimony and his demeanor upon the stand.

In the present case, the government might well ask for a conviction upon proof not merely that he had knowledge concerning the liquor found on his premises, on March 26, or that he had sold liquor to Mrs. Cofran, or that Hirsch had ever been in his employment, or that he had ever sold liquor to a female, or that he had sold to anybody since he had been notified by a committee of citizens, six or seven weeks before the date of the indictment; but also upon proof that he had sold spirituous liquor at any time, and to any person, within one year previous to the finding of the indictment. Gen. Stats., ch. 99, § 27. Indeed, the only material question for the jury was, whether he had kept for sale spirituous liquors at any time within the year, in violation of section 13 of the chapter.

His object in taking the witness stand was to show himself innocent of this offense by testifying that he had not kept liquor for sale within the year; and putting himself in such a position, and declining to testify except to such matters as would tend to exculpate himself, refusing to answer the most direct, competent and material inquiry raised by the case, was a matter of great significance, which it was the right, if not the duty, of the State's counsel and of the court to bring prominently to the attention of the jury. See *Andrews v. Frye*, 104 Mass. 234.

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It is undoubtedly a general proposition and a wholesome rule, that, if a witness declines answering a question on the ground that his answer will tend to criminate him, no inference of the truth of the fact is permitted to be drawn from that circumstance. 1 Greenl. on Ev., § 451.

And the statute of 1869 (1 Sess. Laws, chap. 23), allowing respondents to testify, and providing that no inference of guilt shall be drawn from their neglect to testify, is but an affirmance of this proposition. But it is also very clearly settled that, in all cases where the witness, being advertised of his privilege to decline to answer, chooses not to avail himself of the privilege, but elects to answer the particular inquiry which he might have avoided, he is bound to answer every material question relating to the transaction. 1 Greenl. Ev., § 451; *The State v. K——*, 4 N. H. 562; *Coburn v. Odell*, 30 id. 554, 555; 2 C. & H. notes to Phil. Ev., 736, 737.

The respondent was not bound to volunteer any statement concerning the matter of the charge against him, nor could he be compelled to disclose any fact, or answer any question which would expose him to another criminal prosecution, or tend to convict him in this. Such immunity from confession, examination, argument or prejudicial inference, was his undoubted privilege; but he chose to waive it, and insisted upon his right to testify; and having testified concerning a part of the transaction, in which it was alleged that he was criminally concerned, without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience. It is clear, upon reason and authority, that he might have been compelled to answer the question propounded by the State's counsel. It was material to the issue, if not directly involved in his own proffered testimony. At this point, for obvious reasons, he saw fit to close his lips, and the court allowed him to remain silent. Of this mistaken clemency he cannot now be heard to complain.

The whole argument of his counsel now proceeds upon the erroneous assumption that the ruling of the court was right. That assumption being groundless, his argument fails.

The views of so eminent a man as Judge COOLEY seem to be adverse to those now expressed. He inclines to the opinion that a party accused of crime should be and is entitled, under statute of Michigan allowing the accused to give evidence in his own behalf, to disclose no more than he chooses—"if he does testify, he is at

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liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself; and the statutory privilege becomes a snare and a danger.") Cooley's Const. Lim. 317; also p. 182.

The learned jurist does not furnish us with cases in support of his views, which, after such consideration of them as the great ability and learning of Judge COOLEY compel, we cannot regard as being supported by authority or sound reason. But the statute of Michigan is peculiar. By its provisions the accused is allowed to make a statement to the court or jury, and may be cross-examined on any such statement. It has been held, says Judge COOLEY, that this statement should not be under oath.

In speaking of this statute and of the right given to cross-examine the party who has made his statement, Judge CAMPBELL says: "And while his constitutional right of declining to answer questions cannot be removed, yet a refusal to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury." *People v. Thomas*, 9 Mich. 321.

Upon the whole, we are unable to reach any other conclusion than that the respondent's testimony, so far as it went—and not less the fact that it went no further—his refusal to submit to a full cross-examination, within proper limits, after waiving his constitutional privilege, and all his conduct and demeanor, were proper matters for comment by counsel and court, as well as for the consideration of the jury. The exceptions are, therefore,

Overruled.

NOTE.—To the third edition of his work on Constitutional Limitations, Judge COOLEY appends (page 317) the following note relative to the foregoing case: "By a recent case this paragraph appears to have led to some misapprehension of our views, and consequently we must regard it as unfortunately worded. Nevertheless, after full consideration, it has been concluded to leave it as it stands. What we intend to affirm by it is, that the privilege to testify in his own behalf is one the accused may waive without justly subjecting himself to unfavorable comments; and that if he avails himself of it, and stops short of a full disclosure, no compulsory process can be made use of to compel him to testify further. It was not designed to be understood that in the latter case, his failure to answer any proper question would not be the subject of comment and criticism by counsel; but on the contrary, it was supposed that this was implied in the remark that 'it must be left to the jury to give a statement which he declines to make a full one, such weight as, under the circumstances, they think it

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entitled to.' All circumstances which it is proper for the jury to consider, it is proper for counsel to comment upon."

The author then proceeds to state the above case of *State v. Ober*, and continues, "we not only approve of this ruling but we should be at a loss for reasons which could furnish plausible support for any other. It is in entire accord with the practice which has prevailed, without question, in Michigan, and which has always assumed that the right of comment, where the party makes himself his own witness and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstained from asserting his statutory privilege." — RMP.

WINCHESTER v. NUTTER.

(58 N. H. 507.)

Contract — Wager.

At a meeting to make arrangements for a squirrel hunt, it was agreed that the beaten party was to pay for the supper of the victors, and the captains of each party (the defendants) engaged the plaintiff to furnish the supper. The plaintiff presided at the meeting, and understood and knew how the suppers were to be paid for. *Held*, in an action against defendants for the supper for the whole party, that plaintiff was entitled to recover.

ASSUMPSIT by Cummings M. Winchester against Oscar Nutter and Elden Farnham, upon an account for twenty-four suppers furnished to order, at \$18. Several persons met one evening in Lancaster to arrange for a squirrel hunt. Plaintiff was chosen chairman, and the defendants each captain of respective sides. They chose their men, twelve on a side, including the defendants, and at the close of the hunt the beaten party were to pay for their opponent's supper, each man for himself and one of the opposite side, but the captains were to engage supper for all and settle with the men afterward. According to the arrangement, defendants engaged plaintiff to furnish the suppers at seventy-five cents each for the twenty-four, which plaintiff did, and the suppers were eaten by the two sides. Plaintiff knew and understood the arrangements for paying for the supper.

Defendant moved for a nonsuit on the ground that the contract was void under the provisions of Gen. Stat., chap. 254, § 12, as being a bet or wager, or "growing out of such bet or wager." The motion was denied, and defendant excepted.

Fletcher & Heywood and *E. Fletcher*, for defendants, cited *Perkins v. Eaton*, 3 N. H. 152; *State v. Leicht*, 17 Iowa, 28; *Blossome v. Williams*, 3 B. & O. 232; *Welsh v. Cutler*, 44 N. H. 561; *Stacy v. Foss*, 19 Me. 335; *Murdock v. Kilborn*, 6 Wis. 468, and *Hitchins v. The People*, 39 N. Y. 454.

Ray & Drew and *G. A. Bingham*, for plaintiff.

FOSTER, J. The plaintiff furnished, sold, and delivered to the defendants, at their special request, twenty-four suppers; why should not the defendants pay for them, there being no controversy about the price or the quality of the article furnished?

The plaintiff has fully performed his part of the contract; why should not the defendants perform their part?

Because, they say, that although they have received and eaten the plaintiff's suppers, still those suppers were provided in order to enable certain parties to pay a bet or wager; therefore, the contract for the purchase and sale of these suppers grew out of a bet or wager; and such a contract, they contend, is illegal and void, and in any effort to enforce it, *potior est conditio defendentis*.

If this contract is held void, it can only be on the ground that the wager was illegal — a violation of law; and the plaintiff, by contracting to furnish the suppers absolutely, whatever might be the result of the squirrel hunt, for a certain price and payment, absolute and unconditional, to these two defendants, whether they or the party that either one of them represented should be defeated or not in the event of the hunt, aided, abetted, counseled, hired, or procured the commission of a crime or misdemeanor.

At common law, some contracts of wager are valid and some are void. 2 Pars. on Cont. 627, 755. But the common law, allowing actions to be maintained upon a wager in cases not contrary to public policy nor prohibited by statute, has never been adopted in New Hampshire.

Here all wagers are void contracts. *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 id. 104. This is not because the contract is to commit or be accessory to a crime or a misdemeanor, for a wager contract is neither a crime nor a misdemeanor. Mere betting, unconnected with a criminal offense, is no offense against the criminal law. Neither the common law nor any statute of this State affixes any penalty to betting, as a criminal offense, or in any respect a misdemeanor.

Winchester v. Nutter.

The plaintiff presided at the meeting at which the arrangements for the hunt and for the subsequent suppers were made. He knew and understood fully all these arrangements. And so he may be said to have aided and abetted the transaction. But as the wager was not a misdemeanor, the plaintiff, in aiding the wager, did not aid a misdemeanor.

Here was no offense against the common law. How is the transaction to be viewed in the light of our statutes, and how is it affected by them? The wager contract is simply a void contract.

Section 12 of chap. 254, Gen. Stats., provides that "all bets and wagers, upon any question where the parties have no interest in the subject except that created by the wager, are void; and either party may recover any property by him deposited, paid, or delivered upon such wager or its loss, and repel any action brought for any thing, the right or claim to which grows out of such bet or wager."

The contract of wager, then, as between the parties to that contract, the winning and losing parties in the result of the hunt, was a void contract. But it was not void as being an undertaking to violate the law, nor as an undertaking involving any violation of law punishable by a penalty as an offense against the criminal law.

The criminal law does not prohibit the contract. The criminal law is not violated by it. The criminal law affixes no penalty to the making or execution of the contract. The contract is in no way connected with a violation of the criminal law, for betting is not a violation of the criminal law.

Therefore, the doctrine of *participes crimines* does not arise, and cannot be applied, because there is no *crimen*; no statutory nor common-law offense, no municipal regulation nor ordinance — nothing but a special statute imposing no penalty by virtue of any criminal process or proceeding, and not declaring a wager to be a misdemeanor, but merely denying a civil remedy and annulling a contract upon grounds of supposed public policy.

What is the public policy? Probably to restrain the tendency to idleness and improvidence, which is likely to be promoted by indulgence in the habit of betting. But public policy has not seemed to require that such amusements should be punished as a crime or misdemeanor, nor even that they should be so much as forbidden, by the language of the law. The act of betting and the contract of wager is, therefore, neither *malum in se* nor *malum prohibitum*, in the eye or the letter of the law.

Furthermore, as to the public policy, then, of the special statute referred to, which only renders the contract or wager void, its purpose and intent may be gathered from an additional part of the statute; for a subsequent section of the same chapter—section 14—furnishes a definition of the terms “bet” or “wager,” as employed in the previous section. “Any contract or agreement for the purchase, sale, loan, payment, or use of money or property, real or personal, the terms of which are made to depend upon, or are to be varied or affected by, any uncertain event in which the parties have no interest except that created by such contract or agreement, shall be deemed a bet or wager.”

Now, it seems very clear that the idea of the special statute, section 12, is to declare void and to annul all contracts, the consideration or performance of which depends upon such an uncertain event as is mentioned in section 14,—that is, where one party's consideration, to be furnished, and the other party's performance or payment is to be furnished or made, according as such uncertain event may happen; in other words, where the contract is to be performed if the uncertain event happen, and not to be performed if it does not happen, or *vice versa*.

The statute, then, evidently applies to a party to the transaction, and under its provision the losing party may successfully resist an action to recover the money or value of the thing forfeited by the terms of the wager, or any action to recover damages for the non-performance of any act stipulated to be done, or for the omission of performance of any act stipulated not to be done, or indeed any action founded upon any thing growing out of the wager.

And this immunity from liability would probably attach to any person not directly a party to the wager, who might be so identified with the transaction as that his cause, claim or rights should grow out of and depend upon the uncertain event which was the subject of the wager.

But, as between the parties to this suit, there was no element of uncertainty involved in *their* contract. The defendants contracted with the plaintiff that he should furnish for them twenty-four suppers, at seventy-five cents each, upon their credit. They agreed to pay for them. This was the whole of the contract. Their own reimbursement was to be regulated independently of their contract with the plaintiff. He was not to gain or lose by the success or the defeat of either party. The consideration for the defendant's

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promise was the suppers, which the two defendants were to have and dispose of as they might see fit. They might eat the twenty-four suppers themselves, or give them to their dogs. They were to receive so much food, absolutely and at all events. They, and only they, were to pay the plaintiff for it, absolutely and at all events. There was no element of uncertainty on either side of this contract.

It is said that money lent for the purpose of betting cannot be recovered by the lender of the borrower. *Peck v. Briggs*, 3 Den. 107; *Ruckman v. Bryan*, id. 340; 2 Pars. on Cont. 756, note *k*; but that depends entirely upon the question whether the wager was a crime or a misdemeanor, or a contract connected with a violation of law.

So, a note given for money knowingly lent to be applied for the suppression of a prosecution for crime is void. *Plumer v. Smith*, 5 N. H. 553; but, by RICHARDSON, C. J., "it is most unquestionably illegal, in a private individual, to suppress a criminal prosecution."

A bet upon the result of a squirrel hunt is, most unquestionably, not a violation of any law of this State.

The defendants' exception is therefore overruled, and their motion for a

Nonsuit denied.

GORDON V. MANCHESTER AND LAWRENCE R. R.

(53 N. H. 506.)

Carrier. Railroad — failure to start according to time-table.

Plaintiff was the purchaser of a season ticket on defendants' road, between S. and M. Defendants published a time-table advertising a train from S., 8.45 A. M., to M. at 9.35 A. M. On a certain day plaintiff was at the depot at S., in time to take this train, but it did not stop there. In assumpsit by plaintiff for damages against defendant for a failure to transport him punctually to M. on the day in question, defendants offered to prove that the road was suitably conditioned for ordinary travel, and had accommodation for any anticipated excess on extraordinary occasions; that upon this day an unusual and unexpected number of persons took passage from stations before reaching S., and that it could not accommodate more with safety, the cars being already overloaded; that, as several persons were waiting at S. besides plaintiff, they could not have discriminated if they could have accommodated

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any more ; that they had eighteen passenger coaches and one baggage car on this train and could not have stopped at S., being on an up-grade, without being impossible to start again ; and that as soon as it could be done safely the company had sent a train to S. to bring the passengers there waiting to M. This evidence was all excluded.

Held, that the offered evidence was improperly excluded because it tended to free the defendants of the imputation of negligence in not doing all in its power to transport the plaintiff punctually according to its time-table.

ASSUMPSIT brought by George Gordon against the Manchester and Lawrence Railroad. Plaintiff purchased of the defendant a season ticket, of which the following is a copy :

“ Manchester & Lawrence Railroad. Season ticket. Pass George C. Gordon for three months, ending September 30, 1870, between Salem and Manchester.

“ CHAS. E. TWOMBLY, G. T. A.”

This ticket was purchased on or about July 1, 1870, and plaintiff paid defendant \$20 for it. Defendants conceded that, during the year 1870, it published a time-table which advertised a train from Lawrence at 8.27, leaving Salem at 8.45 A. M., and arriving at Manchester at 9.35 A. M. Plaintiff testified that he, on September 8, 1870, was at Salem depot ready to take the morning train, which went by without stopping, and that he did not reach Manchester until 2 P. M., and rested.

A motion was made for a nonsuit, which was denied, and an exception taken by defendant.

The defendants then offered to prove the following facts: “ That said defendants have, at all times before, and on the said September 8, 1870, and since, supplied said railroad with a good and sufficient number of suitable cars and locomotives for transporting the usual and regular travel on said road, and for accommodating the excess ordinarily to be anticipated from extraordinary occasions. That, on said September 8, when the plaintiff alleges that he was not taken by the morning train, an extraordinary, unusual and unexpected number of persons appeared at Lawrence to take passage on the train, and there, and at Methuen and Messer’s, so completely filled the passenger and baggage cars as to occupy all the seats, fill the aisles and platforms, and otherwise overload the cars, so that it would have been dangerous to have admitted more passengers on the train ;

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that at said station of Salem there was, besides the plaintiff, a large number of persons — to wit, one hundred — waiting for transportation, whom it would have been impossible to have taken into the already overloaded cars, and it would have been dangerous to the safe transportation of the passengers already on the train to have permitted any of the persons at the said station of Salem to get on board, and that the defendants could not have discriminated as to whom they would take or decline to take, even if they had had the means to transport any of them; that the defendants were common carriers, and were and are bound to receive and carry all persons asking transportation, so far as their means would allow, and had no right to refuse transportation because they anticipated that at some other station there might be other persons also claiming transportation; and that the defendants had no reason to expect that such an unusual number of persons would apply for transportation on the morning of the said September 8; and that the defendants, on the arrival of the train in Manchester, and as soon as the same could be done with safety to the traveling public, sent back the train to said Salem to bring the plaintiff, and all other persons desiring transportation, to Manchester, which was all that said defendants were bound to do in law.”

The defendants also offered to prove “that the train consisted of eighteen passenger cars and one baggage car, and that, if the train had stopped at that station, being on an up-grade, it would have been impossible to have started it.”

This evidence was excluded, and defendants excepted.

The court charged the jury “that the defendants were liable for not carrying the plaintiff, and that it made no difference by what means they were prevented from fulfilling their contract.”

The jury returned a verdict for the plaintiff. The defendants moved to set it aside.

Mr. Marston, for plaintiff.

S. C. Eastman and *G. C. Bartlett*, for defendants.

SMITH, J. In order to decide whether the evidence offered by the defendants was rightly rejected, it is indispensable to determine what the contract was. If the defendants entered into an absolute and unconditional engagement to transport the plaintiff to Manchester

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at the precise hour and minute named in the time-table, the ruling of the court was correct. If, on the other hand, the defendants only engaged to do all that due care and skill could do to insure punctuality, a different result may follow.

A common carrier of passengers is a person upon whom the law imposes particular obligations; "and all persons are supposed to deal with the carrier on the terms which the law predetermines, unless they specially provide otherwise." "A particular arrangement is determined by a provision of the law, subject to be altered by a special convention between the parties." Where the contract is in general terms, or is not expressed in words at all, and there are no external circumstances indicating the intention of the parties that the carrier should assume more or less than his ordinary liability, the contracting parties are regarded as tacitly adopting and incorporating into their contract the common-law provisions relative to the obligations and liabilities of common carriers of passengers. It would be an idle ceremony for the parties to go through the form of uttering words which "express no more than the law by intendment would have supplied."

By the common law, common carriers of passengers are bound to use due care and skill to transport passengers safely and promptly; but they are not insurers of results; they are not held liable as absolute warrantors of safety or speed. The burden of proof rests on the party asserting that the carriers entered into an engagement more onerous than that which the common law imposes on them. We have now to inquire what circumstances there are, in the present case, to indicate that the defendants assumed so much more than their common-law liability as to become absolute warrantors of punctuality.

The plaintiff paid his fare in advance.

This is nothing more than what the great majority of passengers do, without any idea that the carriers are thereby made to incur any unusual responsibility. Nor does it appear that the plaintiff understood that his payment in advance for the season gave him any especial preference over passengers who had paid in advance for a single passage. It is not suggested that season passengers were charged an extra price. In all probability, each trip cost the plaintiff in a much smaller average sum than if he had paid single fares.

The plaintiff had a ticket.

It has been said by this court that "ordinarily the ticket is not

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and does not contain the contract." *Johnson v. Concord R. R.*, 48 N. H. 213, p. 219. And it has been asserted that a ticket is rather in the nature of a receipt for the passage money, — "a mere token or voucher adopted for convenience, to show that the passenger has paid his fare from one place to another." DENIO, J., in *Quimby v. Vanderbilt*, 17 N. Y. 306, p. 313; EARL, Com., in *Rawson v. Penn. R. R. Co.*, 48 id. 212, p. 217. Certainly, the ticket now in question does not purport to express, and does not express, all the terms of the contract. If this were held otherwise, the plaintiff might find it difficult to make out even a *prima facie* case. Looking only at the literal language of the ticket, and considering it as the sole and conclusive evidence of the terms of the contract, it might be said that the plaintiff has had all that the ticket entitled him to, namely, a passage to Manchester. The ticket does not specify that trains shall run at reasonable hours, or with reasonable dispatch, much less that they shall run at regular and fixed hours. It is obvious that neither party can fairly be asked to regard the ticket as expressing all the terms of the contract. There is nothing in this ticket to indicate that the contract was an unusual one, or made upon any other basis than the common-law obligations of carriers. It was unnecessary that the ticket should express in words what the law tacitly implies. "*Expressio eorum quæ tacite insunt nihil operatur.*" (For instance of contracts in general terms, which are construed as containing implied conditions exonerating a party who is without fault, see *Dexter v. Norton*, 47 N. Y. 62, note to *Hull v. Wright*, 96 Eng. Com. Law, p. 795; *Robinson v. Davidson*, L. R. 6 Exchq. 269; *Taylor v. Caldwell*, 3 Best & Smith 826; — also, L. R., 4 C. P. 1 id. 744.)

The defendants had published a time-table, upon which a train was advertised as leaving Lawrence at 8.27 A. M., leaving Salem at 8.45 A. M., and due at Manchester at 9.35 A. M.

Undoubtedly, "the representations made by railway companies in their time-tables cannot be treated as mere waste paper." Lord CAMPBELL, C. J., in *Denton v. Great Northern Railway Co.*, 5 El. & Bl. 860, p. 865. It must be conceded that such a public advertisement at least imposes on the defendants the obligation of using due care and skill to have their trains arrive and depart at the times thus indicated. For any want of punctuality which they could have avoided by the use of due care and skill, they are unquestionably liable. Nor can they excuse a non-conformity to the time

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table for any cause, the existence of which was known or ought to have been known to them at the time of publishing the table. "They make the time advertised a criterion of ordinary reasonable time." The publication of the time-table cannot amount to less than this, viz., a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on their part that they will do all that can be done by the use of due care and skill to accomplish that result. Does it go beyond this? Does it amount to an absolute and unconditional engagement that the trains shall arrive and depart at the precise moments indicated in the table? Does it make the company warrantors or insurers of punctuality, and liable for delays which are due, not to their fault, but to pure accident?

If these questions are answered in the affirmative, a very singular result will follow. Railroad companies will be under a much more onerous obligation to run punctually than to run safely. They may, then, on the same state of facts, be held liable for the loss of an hour's time, and not liable for the loss of a year's time, or for the loss of a limb. As to safety, they are bound only to use due care and skill to attain it. They are not liable for mishaps which are not attributable to their negligence. *Readhead v. Midland R. Co., L. R., 4 Q. B. 379, 381.* Suppose the morning train had reached Salem "on time," taken the plaintiff on board, and proceeded toward Manchester; that midway between Salem and Manchester the train had been thrown from the track in consequence of the breaking of a wheel; that such breakage was caused by a latent defect which could not have been previously detected; that the plaintiff by this accident lost a limb, and was permanently incapacitated for labor; and that, after some delay, the plaintiff and the other passengers were carried on by another train, so that they reached Manchester three hours late on the same day; in such a case, it is clear that the defendants are not liable to the plaintiff for the bodily injury, not for his loss of time after reaching Manchester. Does it not seem extraordinary that they should be liable for the loss of the three hours' time when they are not liable for the three years' time since elapsed, or for the loss of the limb? Is it natural to suppose that the parties understood the obligation to carry speedily, to be more rigid than the obligation to carry safely? A large proportion of passengers might consider the latter obligation the more important of the two, and might prefer delay to death. It

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is not now suggested that the defendants could not impose upon themselves a liability in respect to punctuality, far in excess of their obligations in other respects. But, in considering whether they have done so, the incongruous nature of such action on their part may be entitled to some weight. We should naturally expect the party alleging such action to offer very explicit evidence of it. The case is unlike that of a charter party. There, the parties enter into a written agreement which, presumably, expresses all the terms of the contract. If, in such an agreement, it is stipulated that the ship shall sail on or before a particular day, there may be no good reason for giving this express stipulation any other than a strictly literal construction, or for implying conditions or limitations not named in the writing. See *Glaholm v. Hays*, 2 Man. & Gr. 257; *Croockewit v. Fletcher*, 1 Hurl. & Norm. 893. In the present case, there is no formal contract, either written or oral. The great inquiry is, what was the contract? The nature of the contract is to be gathered from various documents and circumstances. The time-table is only one among several pieces of evidence, from all of which, taken all together, the contract is to be inferred.

The importance of punctuality is undeniable, but so is the importance of safety. The serious results of a failure in either respect may be weighed in determining whether the carriers have used due care and skill; but the importance of success does not furnish conclusive evidence that the company have absolutely guaranteed against failure. Moreover, the known difficulty of attaining absolute punctuality throughout a whole year may be taken into account as a sort of offset to the argument founded on the importance of punctuality. This difficulty may diminish the probability that the company would assume such a rigorous obligation. In *Howard v. Cobb*, 19 Monthly Law Reporter, 377, the contract related only to a single trip of a steamer. But here, there is no ground for asserting that the defendants made any different agreement relative to their morning train on September 8, so far as punctuality is concerned, from that entered into respecting all their other regular trains throughout the whole year. Practically, the question is, whether they have undertaken to guarantee exact punctuality in the arrival and departure of all their trains throughout a whole year. We are not reduced to the dilemma of considering the time-table as evidence of such a guaranty, or else giving it "no meaning and effect at all." As has already been intimated, much effect can be given to it, as

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increasing the obligations of the defendants, without construing it as an absolute warranty of punctuality.

Upon the whole, we think that there is no evidence that the defendants entered into an absolute and unconditional engagement that the trains should depart and arrive at the precise moments indicated in the time-table. The defendants were not liable for the failure to carry the plaintiff in the morning, unless that failure was attributable to their negligence, to their neglecting to do all that due care could do to run in conformity to the time-table. The rejected evidence tended to show that the failure was not attributable to their negligence. It should, therefore, have been received, and submitted to the consideration of the jury.

An examination of reported decisions does not disclose any strong preponderance against the views now expressed. In most cases the negligence of the carrier has been proved or admitted.

Hawcroft v. Great Northern R. Co., as sometimes cited, might seem strongly against the defendants; but, as reported, its bearing in that direction is not so obvious. It is a case decided by PATTERSON, J., and WIGHTMAN, J., in the Queen's Bench, in 1852, and is reported in 16 Jurist, 196, 8 Eng. Law & Eq. 362, and more fully in Law Journal, vol. 30 (N. S.), vol. 21, Q. B. 178. The plaintiff purchased an excursion ticket from Barnsley to London and return. Upon the back of the ticket were the words, "to return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof." The defendants advertised certain trains for excursion ticket-holders, including one train leaving London at 6.45 A. M., on Saturday, and another at 9.15 P. M. Upon all the facts, the court seem to have concluded, and we think correctly, that the plaintiff had a right to understand that both trains were advertised as carrying through to Barnsley. The plaintiff went to the London station as early as 6 A. M. on Saturday; but the pressure of persons wishing to be passengers by that train was so great that he was unable to obtain a seat in it, although it consisted of thirty carriages drawn by two engines. The company caused an extra train of twenty-three carriages to be sent about noon, but this train was also filled without the plaintiff's being able to procure a place. The company made every exertion to procure and send off another extra train during the day, but were unable to do so for want of sufficient engines, carriages, and servants at the London station to meet the extraordinary influx of returning excursion passengers on

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that morning, although they were sufficiently supplied for the ordinary excursion traffic of the company. The defendants contended that it would have been unsafe to have dispatched the 6.45 A. M. train with more than two engines, or with a greater number of carriages; but it was conceded that a sufficient number of trains to convey all excursion ticket-holders might have been dispatched with safety long before noon, if the company had been provided with a sufficient number of engines, cars and servants for the purpose at the London station. It was claimed that the transportation provided would have been sufficient to accommodate all applicants on any other Saturday morning for two months, and that the number of applicants on the Saturday morning in question was greater than on any other Saturday. The plaintiff took passage in the 9.15 P. M. train, which carried him only as far as Doncaster. No arrangement had been made for carrying him thence to Barnsley, and no train ran thither until Monday. The county judge, at the trial, ruled that there was a special contract binding the defendants to carry the plaintiff by the 6.45 A. M. train, or by some other train within a reasonable time after that hour; that carrying by the 9.15 P. M. train was not a sufficient compliance with the contract, but if so, there was a breach in carrying no farther than Doncaster; that the extraordinary influx of passengers was no defense, but the company were bound to provide sufficient accommodations at or within a reasonable time after the hour advertised for all excursion ticket-holders. In arguing to set aside the verdict for the plaintiff, rendered under these rulings, the counsel for the defendants said: "Could the company be sued if they had refused to carry a passenger when there was no room for him? They were common carriers, and bound to carry safely." Thereupon, PATTESON, J., remarked: "They should have made it a condition of their contract that they would not carry unless there was room." The court refused to grant a new trial. PATTESON, J., said: "The defendants, in refusing to take the plaintiff by the morning train, were right, because the train was too full to allow him to be carried with safety. But if they put him off and kept him until the evening, they should have made some special provision for carrying him on to Barnsley at once. I do not think that they had any right to keep him in London until the 9.15 evening train. They should have sent another train. The case finds that they might have done so without danger." WIGHTMAN, J., said: " * * * I think that by

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going by the evening train he has waived any right to complain of having been kept until the evening. But if he was content to wait and go by the evening train, he ought to have been carried on as far as Barnsley, unless they had told him what the state of the case was with respect to the stopping at Doncaster, or had made some special terms with him."

In that case it is clear that the company were liable, at all events, for failing to make any attempt to carry the plaintiff through to Barnsley by the evening train. WIGHTMAN, J., rests his decision entirely on this, and it is questionable whether the case can be regarded as an authority for any thing beyond this. The county judge, at the trial, seems to have ruled that the defendants complied with their contract if they carried the plaintiff within a reasonable time after the hour advertised. This is all that the defendants can ask in the case at bar. It means "reasonable under all the circumstances of the case;" and such a ruling is inconsistent with the theory of an absolute guaranty of punctuality. The *dictum*, and the decision of PATTESON, J., may be susceptible of the construction that the company had failed to use due foresight to anticipate and provide for the emergency, and that they were liable on that ground. We think that the case cannot be regarded as an authority entitled to controlling weight in the present instance (see 2 Redf. on Railways, 5th ed., p. 281); and we have stated it thus fully, not so much by reason of its intrinsic importance, as on account of the frequency with which it has been cited elsewhere.

Other cases will be noticed more briefly. In *Sears v. Eastern R. Co.*, 14 Allen, 433, the company were liable for not using due care to give notice of the change in the starting time of the train. In *Lafayette R. R. Co. v. Sims*, 27 Ind. 59, the company did not attempt to show that they had used due care to provide accommodations. They demurred to the replication, instead of rejoining that there was an unexpected rush of passengers which they could not reasonably have anticipated. *Dunlop v. Edin. & Glasgow Ry. Co.*, 16 Jurist, part 2, 407, 408, was a case where the company were clearly in fault. In *Denton v. Great Northern Ry. Co.*, 5 El. & Bl. 860, the defendants were liable for falsely representing that a train would start when they knew it would not. There was no attempt on their part to comply with the advertisement. *Weed v. Panama R. R. Co.*, 17 N. Y. 362, is a case where the delay was held chargeable to the fault of the defendants, on the principle that the act of

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their servant was their act;—see, also, *Blackstock v. N. Y. & Erie R. R.*, 20 N. Y. 48. In *Deming v. Grand Trunk Ry. Co.*, 48 N. H. 455, it appeared that, on February 21, the plaintiffs told the defendants that they had wool to send to Boston, which had been contracted for and which they were very anxious to have go forward immediately, and that, unless it could be sent forward from Northumberland the next day, it must go by another railroad route. The defendants thereupon received the wool, and agreed to forward it from Northumberland on February 22, but did *not* forward it until March 16. The defendants offered to show that, owing to the approaching termination of the reciprocity treaty, there was at this time a great and unusual rush of freight, and that this occasioned the delay. They did not offer to prove that the rush commenced after the making of their contract with the plaintiffs, or that the plaintiffs had knowledge of it. The evidence was rejected. (See the ruling on p. 461.) That case differs from the present in at least two vital particulars: First, the special stress laid on punctuality in the negotiation tended to show an absolute contract to carry within a prescribed time, and the jury found such a contract. See *Harmony v. Bingham*, 12 N. Y. 99; *Wilson v. York, Newcastle & Berwick Ry. Co.*, 18 Eng. Law & Eq. 557, in note; MULLIN, J., in *Van Buskirk v. Roberts*, 31 N. Y. 661, 674, 675. Second, the existence of the alleged cause of delay was, for aught that appeared, fully within the knowledge of the defendants at the time they contracted with the plaintiffs. They were in fault for knowingly undertaking more than they could perform. See *Porter v. Steamboat New England*, 17 Mo. 290. In *New Orleans, etc., R. R. Co. v. Hurst*, 36 Miss. 660, the company offered no excuse whatever for running past the station; and in *Heirn v. M'Caughan*, 32 Miss. 17, there was evidence tending to show want of due effort to stop. In *Strohn v. Detroit & Mil. R. R. Co.*, 23 Wis. 126, it seems to have been held that a mere statement by the carrier's agent that the ordinary time for transportation of freight is a certain number of days, is not sufficient to show a contract to carry within that time. In Angell on Carriers (4th ed.), § 527 *a*, it is said that the time-tables are "in the nature of a special contract, so that any deviation from them renders the company liable;" but we think no authority there cited, unless it be *Hawcroft v. G. W. Ry. Co.*, directly sustains this position.

It would seem that the English railway companies are now in the

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habit of inserting notices in their time-tables that they do not warrant that the trains will arrive and depart at the precise time indicated. See BOVILL, C. J., in *Lord v. Midland R. Co.*, L. R., 2 C. P. 339, 345; *Hurst v. Great Western R. Co.*, 19 C. B. (N. S.) 310; *Prevost v. Great Eastern R.*, 13 Law Times, N. S., 20; *Buckmaster v. G. E. R. Co.*, 23 id. 471. But this practice may have been adopted from abundant caution, and does not seem to us to furnish decisive evidence of the understanding of the legal profession that the time-table, without the notice, would import a warranty. In this country nearly all the railroads publish time-tables, and delays, not attributable to negligence, are not uncommon; yet suits to recover damages for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented, "shows very strongly what has been understood to be the law upon the subject."

The motion for a nonsuit was properly denied; for the jury might have found negligence from the (then) unexplained evidence that the train ran by Salem. The new trial is granted, because of the rejection of the evidence which the defendants offered, to explain this circumstance.

Verdict set aside.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE V. EARLE.

(24 La. Ann. 88.)

Criminal law — challenge.

Where two or more persons are indicted and tried jointly, the State is entitled to no more peremptory challenges than when the trial is against one alone.

INDICTMENT for murder — appeal by the defendants.

S. Belden, attorney-general, for State.

A. A. Atoche, for defendants.

HOWE, J. The defendants having been found guilty of murder and sentenced accordingly, have appealed to this court. They make five points here, of which, however, it will be necessary to examine but one.

It appears from an inspection of the first bill of exceptions taken during the trial, that the State was allowed to challenge peremptorily more than six jurors, the court below deciding that each prisoner was entitled to twelve peremptory challenges and “the State to six for each accused.”

It is true that each defendant was entitled to twelve peremptory challenges, but it by no means follows that the State is entitled to six for each defendant. The State has no rights in the matter beyond those conferred by the statute, and the statute declares that "in all criminal prosecutions wherein the defendant is allowed peremptory challenges, the State shall also be allowed to challenge without cause any number not exceeding six." R. S. 1870, § 998. This means, clearly, six in a single prosecution—in the trial of a single indictment—without any reference to the number of defendants included in the prosecution, or mentioned in the indictment. The language is plain, the case at bar is within its provisions, and we are, therefore, constrained to think the court erred in allowing the number of peremptory challenges by the State to exceed six.

The precise question in this case was decided by the supreme court of Ohio in the year 1840 in the same way, under a statute which we think practically identical in this respect with our own. In the law of Ohio the phrase "trial of an indictment" was used instead of "criminal prosecution," and the right to challenge, peremptorily, *two* of the panel was given to "every prosecuting attorney" and "every defendant." The lower court, in a case where there were three defendants, having allowed the State *six* peremptory challenges, the supreme court, in reversing the judgment, said:

"There was but one indictment, and on the part of the State the right of peremptory challenge should have been confined to two, while each of the defendants could, in like manner, legally object to the same number. Had the defendants been separately tried, the indictment would have been separate as to each, and on every trial the State's right to such challenge of two of the jurors would have been legal, but upon a joint trial it is otherwise."

We are constrained to order a new trial.

It is therefore ordered that the judgment appealed from be reversed, and that the cause be remanded for a new trial.

Wolfe v. Barnett.

WOLFE V. BARNETT.

(24 La. Ann. 97.)

Trade-marks. What are.

The leading principle of the law of trade-marks is, that the manufacturer or merchant who has produced or brought into market an article of use or consumption that has found favor with the public, and who, by affixing to it some name, device or symbol which serves to distinguish it as *his*, and to distinguish it from all others has furnished his individual guaranty of its value, shall receive the reward of his skill, and shall not be deprived thereof by infringement or imitation.

The words which compose a trade-mark need not *each* be new. If the combination thereof be new and be descriptive of the origin of the goods and their ownership by the manufacturer who devises the mark, it will be unlawful for any other person to filch the combination or any important part thereof. It is unlawful to put up imitation goods under the name of the real manufacturer, and the excuse that such an act was authorized by a person of the same name as that manufacturer, is absurd.

The fact that a trade-mark label is copy-righted, but the date of entry is not given as required by the act of congress, is of no importance in a suit in a State court for damages for imitation of a trade-mark.

APPEAL from the fourth district court.

Henry J. Leovy and Semmes & Mott, for plaintiff and appellant.

Hyams & Jonas, for defendants and appellees.

HOWE, J. The principal point involved in this case is one relating to the law of trade-marks.

The plaintiff enjoined the defendants from preparing and selling or offering to sell any imitation of plaintiff's gin, or any article with or under the name or title of "Wolfe's Aromatic Schiedam Schnapps," or "Aromatic Schiedam Schnapps," or "Schiedam Schnapps," or from using any imitation of said name; and claimed damages for an alleged infringement by defendants of his rights as the manufacturer of this kind of gin and as the originator of the trade-mark.

The defendants answered by general and various special denials.

The cause was tried by a jury, who rendered a verdict, the effect

of which, as confirmed by the judgment of the lower court, was to restrain the defendants only from the use of the word "Wolfe," and to throw upon the plaintiff the costs of the suit, his claim for damages being rejected. The plaintiff has appealed.

It appears from testimony uncontradicted and unimpeached that the plaintiff manufactures his gin in Holland and puts it up in bottles with uniform and peculiar marks and labels; that he has been engaged in business of this kind since 1851; that the name of "Wolfe's Schiedam Aromatic Schnapps," impressed on the bottles and forming part of the labels, was devised by him to denote his goods thus made and sold; that in the trade this name was fully recognized as his trade-mark; that the phrase "Schiedam Schnapps" was fully recognized as his peculiar property, in that it expressed the origin and ownership of his goods, and suggested to the general public, who had occasion to buy gin, the liquor made, imported and bottled by him; that the liquor thus put up was really gin; that it had certain medicinal qualities supposed by some to inhere in that kind of distilled spirits; and that it had been extensively advertised and sold by plaintiff. It appears, also, that the defendants had for some time been putting up and selling a gin adulterated with water in bottles similar in appearance to those of plaintiff, with labels which were merely colorable imitations of the name, mark, devices and symbols of plaintiff, being headed "Wolfe's Aromatic Schiedam Schnapps" and signed at the foot "Wolfe," instead of the "Udolpho Wolfe" of the genuine label, and with words blown on the sides of the bottles well calculated to mislead a purchaser who did not make an unusually careful scrutiny. It also appears, without any objection, that the defendants had imitated the goods of another manufacturer in a similar way and only desisted upon being threatened with suit.

It is not deemed necessary to review the numerous cases which have been cited in the able briefs of counsel. Some are conflicting. Some depend on technical differences between proceedings at law and in equity. In others the plaintiff's case was not made out by as full evidence as has been produced here. It is sufficient to say that in view of the facts above recited we think the plaintiff entitled to a perpetuation of the injunction originally issued and to damages, and not merely to the very limited relief accorded by the verdict.

It is urged by defendants that the plaintiff's claim is prescribed

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by the prescription of ten years, during which time, prior to the suit, they claim that they have been engaged in the business complained of. The prescription of one year, which is also pleaded, cuts off plaintiff from any claim for damages for any period longer than twelve months prior to citation (Rev. C. C. 3536), but we do not think there is any force in the plea of ten years, or in the further point that "the defendants have acquired as to all the world by uninterrupted possession for ten years a full and complete title to the trade-mark."

It is further urged that the plaintiff is neither the discoverer nor first manufacturer of the article for which he claims the mark. We do not understand the current of authority to be in favor of this proposition that this is necessary to his case. In the passage cited by defendants from Upton on Trade-marks, page 24, that writer says:

"It seems to be the established doctrine that property in trade-marks, so far at least as they consist in the proper name of the thing designated, or by long use have become known by that name, can exist only in those who have the exclusive right to manufacture or to sell the specific article, and so far as they consist in any thing other than the proper name of the thing which is susceptible of becoming a legitimate trade mark, can exist only in the manufacturer or in those entitled to represent the manufacturer."

Assuming this statement to be accurate, it simply means that if the plaintiff's trade-mark had consisted merely of the words "Holland Gin," it would be necessary for him to show an exclusive right to manufacture; but if the trade-mark consists of something else, as the plaintiff's own name combined with a sonorous appellation well calculated to express origin and ownership as well as to attract the attention and impress the memory of buyers, it is only necessary that he should manufacture, without exclusive right, or represent a manufacturer. And we think the true rule, as applicable to this case, is correctly stated in the following passage from the same writer, page 97, to be this:

"That the honest, skillful and industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption, that has found favor with the public, and who, by affixing to it some name, mark, device or symbol, which serves to distinguish it *as his*, and to distinguish it from all others, has furnished his individual guaranty and assurance of the

quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry or enterprise; and shall in no manner and to no extent be deprived of the same by another, who to that end appropriates and applies to his productions the *same or a colorable* imitation of the *same name, mark, device or symbol*, so that the public are, *or may be*, deceived or misled into the purchase of the productions of the one, supposing them to be those of the other."

And see *Stokes v. Landgroff*, 17 Barb. 608; *Howard v. Henriques*, 3 Sandf. 725; *Brooklyn White Lead Company v. Massuy*, 5 Barb. 416; *Williams v. Johnson*, 2 Bosw. 1.

It is in vain for defendants to urge that the several words which compose the name given by plaintiff to his goods are not new. His combination of these words is proved to have been new, and it is proved to indicate the origin and ownership of the liquor, and the defendants have no right to filch this combination, or any important part of it, in such way as to mislead the purchaser as to the real origin and ownership. Upon this branch of the case the decision in *Gout v. Alesslogn*, 6 Beav. 69, is in point, where the defendants were restrained from using not merely the name of plaintiff, upon watches, but also any of the Turkish words and other devices first used by plaintiff to describe the merits of his watches. And see *Clark v. Clark*, 25 Barb. 76.

Still less can the defendants escape under the absurd excuse given in this testimony that they were putting up and selling the "imitation goods" under a written permit from a Mr. Wolfe, the father-in-law of one of them. It appears that this person died about four years before this action was begun, but, if he had lived, the use of his name under this permit would only have made the defendants' attempt to deceive seem more deliberate and studied. *Croft v. Day*, 7 Beav. 84; *Rodgers v. Nowill*, 5 Man., Gr. & Scott, 109. Nor is there any merit in the point that the plaintiff cannot recover because his label, which contains the statement that it is copyrighted, does not also show the date at which the entry was made; nor in the point that he had no right, in any event, to copy-right a label. This is not a suit to enjoin the infringement of a copyright, the courts of the United States alone having jurisdiction of such cases. Conkling, 112. We presume the proof to show that in 1851 the plaintiff copy-righted his label in New York, was merely intended to show that he devised the label as early as that year.

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We fix the damages in this case at \$1,500.

It is therefore ordered that the judgment appealed from be reversed and the verdict set aside; that the plaintiff have judgment against the defendants, *in solido*, for the sum of \$1,500; and that the preliminary injunction issued herein be perpetuated, with costs in both courts.

STATE ex rel. VAN ORDEN v. SAUVINET.

(24 La. Ann. 112.)

Contempt — pardon.

The governor of a State has power to pardon for contempt.

HABEAS CORPUS. The opinion states the facts.

George S. Lacey and Chas S. Rice, for relator.

C. T. Beamis, for respondent.

TALIAFERRO, Justice, delivered the opinion of a majority of the judges sitting at chambers to hear the habeas corpus granted in this cause.

TALIAFERRO, J. The relator complains that he is under illegal arrest and held in custody by the civil sheriff of the parish of Orleans in obedience to an order rendered by the judge of the sixth district court of the parish of Orleans, on the 6th of March, 1872, sentencing him to arrest and to be held in custody by the sheriff for the term of ten days for an alleged contempt of the orders of the said court. He alleges that for the offense charged against him, and for which he was sentenced as aforesaid, and under pretense of which he is now under arrest and deprived of his liberty, he has applied to and obtained from the governor of the State of Louisiana a full pardon and remission of said offense, and that he has presented the same to the sheriff and demanded his release, but notwithstanding the sheriff refuses to discharge him

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unless under an order of the court which authorized the arrest and detention of the relator. He therefore applies for a writ of habeas corpus directed to the said sheriff, commanding him to bring the relator before the supreme court of Louisiana or any of the judges thereof, and show cause why he thus keeps the relator imprisoned and deprived of his liberty, and why he should not be released and discharged. He prays for relief, etc.

The facts seem to be that in the month of February of the present year suit was brought against Van Orden, the relator, by J. B. Louis to recover from him a cash box and its contents, alleged to contain the amount of \$35,000 in money and public securities, which box and its alleged contents had been deposited with the relator for safe-keeping. A writ of sequestration was issued to take the box out of the hands of the relator, and upon his refusal to deliver it he was sentenced to be arrested by the sheriff, and to be held in custody by him for the period of ten days as for a contempt of court. Application was then made to the governor of the State for a pardon, which was granted. The sheriff, conceiving it to be his duty to hold the party in custody until otherwise ordered by the court, declined to release the prisoner upon the presentation of the pardon granted by the executive; and at this stage of the proceedings the application was made to this court, or to any of the judges thereof, for a writ of habeas corpus, which was issued accordingly.

The questions for determination are:

First. Is this court, or any of the judges composing it, vested with power to issue the writ of habeas corpus prayed for in this case, and to maintain jurisdiction of the matters presented by the petition of the relator?

Second. Has the governor of the State the power to grant a pardon to a party sentenced to imprisonment by a court for a contempt of its authority?

Article 792 of the Code of Practice provides that "the supreme court and each of the judges thereof shall have power to issue writs of habeas corpus at the instance of persons in actual custody, in cases when they may have appellate jurisdiction," etc. We regard the order under which the party in this case was arrested, and is held in custody by the sheriff, as constituting a part of the proceedings in the suit of *Louis v. Van Orden*. The order of sequestration was rendered by the judge in the exercise of his judicial

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functions in determining the issues presented by the parties. The order of imprisonment consequent upon the relator's alleged contempt forms part of the proceedings in the action pending. It grew out of and constituted an important part of those proceedings. It is not easy to disconnect it from them. We do not view it in the light of a separate, independent, isolated action or proceeding detached from the main action, and wholly unconnected with it. If we entertained a doubt on this point we should feel it to be our duty, in a case involving a question of personal liberty, to assume jurisdiction. The matter in controversy between the parties to the suit is clearly within the jurisdiction of this court. Besides, the relator presents himself as occupying also another ground. If the order of imprisonment were considered a decree or judgment entirely distinct from the suit, in the prosecution of which it originated, that decree or judgment of the court is one from which the relator would have the right of appeal. He alleges under oath that that decree, by depriving him of his liberty, detention from his family, and suspension from his business, injures him to an amount exceeding \$500.

The next inquiry is, has the governor the prerogative of pardon in cases of conviction and punishment for contempt of the authority of a court. The investigation which we have been able to make of this question does not satisfy us that the chief executive officer of the State is without power to extend pardon to a party convicted and punished for contempt of court. We find nothing in the constitution of the State which makes an exception in such cases. That the president of the United States is clothed with the power to grant pardons in cases where judges of the United States courts punish for contempts is clearly settled. 4 Opinions of Attorneys-General, 458; 5 id. 579; Blatchford's Circuit Court Reports, vol. 7, p. 24, and cases there cited.

The analogy between the exercise of such a power by the president in all the States, in cases of the sort arising in the courts of the United States, and the exercise of that power in a single State by its governor, in the same class of cases arising in the courts of a State, seems to be strong and well defined. There being no exception found in our State constitution precluding in such cases the exercise of the pardoning prerogative by the governor of the State, we feel no hesitancy in recognizing its existence. That the offense arising from a contempt of the authority of a court is one which,

from its nature, should be summarily punished, to the end that an efficient and wholesome exercise of judicial powers may be had, no one will question. But the opinion entertained to some extent that punishments decreed for such offenses must necessarily be inflicted at the stern arbitrament of the judge, without remission or abatement by the pardoning power, we do not find to rest upon any firm basis of principle or authority. A contempt of court is an offense against the State and not an offense against the judge personally. In such a case the State is the offended party, and it belongs to the State, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender.

That this is a delicate power and should be used only in cases manifestly proper, we are at liberty in our private judgments to believe, while on the other hand we have no question that abuses in the exercise of the power of punishing for contempts may arise, although instances of the kind are rare. We can scarcely think it compatible with the genius of liberal government and free institutions that there should be no shield to protect an individual against a tyrannical exercise by a judge of his power to punish for contempt, and therefore conclude that, upon the principle of checks and balances upon which our American governments are founded, it was not intended by the framers of them that the pardoning power should not reach a party unduly deprived of his liberty by, it might be, a hasty and petulant fiat of a judge. That the power of pardoning in such cases is withheld from the executive departments of our State governments, the counsel representing the plaintiff in sequestration in the case before us, has not satisfied us by the authorities referred to in his brief. These seem to us to rest upon hypothesis and implications only, and indicate no positive constitutional provision withholding the power in question. We do not see the force of the reasoning used to support the deductions made. They seem to be little better than plausible conjecture.

But we are not without authority on the question of the power of the governor of a State to grant pardons in cases of contempts. In 1844, Walter Hickey, of Vicksburg, Mississippi, was sentenced to fine and imprisonment for contempt of the circuit court of Mississippi. He was pardoned by Governor A. G. Brown, and released by the sheriff, but was immediately re-arrested by order of the court. Upon application to Mr. Justice THATCHER of the high court of

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errors and appeals of Mississippi (at that time presided over by Chief Justice SHARKEY), a writ of habeas corpus was issued and Hickey was brought before him. The case being heard, the prisoner was discharged. Judge THATCHER, in rendering his decree, said: "The whole doctrine of contempts goes to the point that the offense is a wrong to the public, not to the person of the functionary to whom it is offered, considered merely as an individual. It follows then that the contempts of court are either crimes or misdemeanors in proportion to the aggravation of the offense, and as such are included within the pardoning power of this State." S. & M. R. vol. 4, p. 751; see, also, Black. vol. 4, 231.

It is proper to add that Lewis, the plaintiff in sequestration, has no interest or right of property in the punishment inflicted. It is no concern of his, but concerns the State alone; and the rule therefore that when a private person (as an informer for example) has acquired a right of property in a penalty, the executive cannot pardon, can have no application to this case.

It is not for us to deal with this subject on the basis of inquiry into the motives of the executive in granting the pardon to the prisoner in this case, nor to pronounce the act discreet or otherwise. In the case here presented it is not denied that the offense was committed. Neither is it pretended that the punishment meted out for the offense was wrongfully inflicted. The party under duress pleads the pardon and remission of the offense, and claims in virtue of that pardon to be released and set at large. Entertaining the views we have expressed, we think him entitled to the relief prayed for.

It is therefore ordered that the writ be made peremptory and the prisoner discharged.

LUDELING, C. J., concurred.

HOWE, J., concurring. I am not prepared to say that the pardon of the executive could legally release a party committed by a judge for purposes of coercion merely, and to enforce a private right; as a contumacious witness, a defendant in injunction under article 308, C. P., or a respondent in mandamus under article 843, C. P. It is highly probable that the element of private interest in the coercive process would prevent the State of Louisiana, through its executive, from releasing the prisoner. 4 Black. 285.

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But there is no such element in this case. The relator has been merely convicted in a summary way of an offense, and imprisoned for a specific period. He had been declared an offender, and the State alone is interested in his punishment as a satisfaction to her injured dignity, and an example to other citizens.

But if the State, through her judiciary, and simply in her own interest, imprison a citizen, it is plain that the State, acting through her executive, can remit the penalty. 4 S. & M. 751 ; 4 Wall. 380. It is the State of Louisiana alone who acts in both instances, and not the individual who happens to be judge or governor. I therefore concur in the decree.

Justices HOWELL and WYLY were not present at the hearing of this cause.

BUSSEY V. MISSISSIPPI VALLEY TRANSPORTATION COMPANY.

(24 La. Ann. 165.)

Common Carrier — tow-boat.

A tow-boat used in towing barges or other water craft, which are loaded with freight, from one point to another on the river, is a common carrier, and the persons owning such tow-boat, who undertake to tow a barge, loaded with freight or merchandise, from one given point to another on the Mississippi river, first giving a bill of lading for the transportation of the cargo on board of the barge, are liable for the delivery of the cargo at the port of destination the same as if it had been placed on board the tow-boat herself.

The value of goods shipped on board of a barge at St. Louis, to be towed to New Orleans by a tow-boat, may therefore be recovered from the company owning the tow-boat, in case of loss while on the trip resulting from the negligence, carelessness, or want of skill in the persons managing the tow-boat.

APPEAL from the fourth district court.

J. Gibson & Austin, for plaintiffs and appellees.

R. & H. Marr, for defendants and appellants.

HOWE, J. The plaintiffs, a commercial firm, sued the defendants, a corporation, whose business is to transport merchandise in

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their own model barges, and to tow the barges of other parties for hire between St. Louis and New Orleans.

The bill of lading, given by defendants to plaintiffs, recites the receipt from plaintiffs of one barge loaded with hay and corn, "in apparent good order in tow of the good steamboat Bee and barges," "to be delivered without delay in like good order (the dangers of navigation, fire, explosion, and collision excepted) to Bussey & Co. at New Orleans, La., on levee or wharf boat, he or they paying freight at the rate annexed, or \$700 for barge, and charges \$267.50."

* * * "It is agreed with shippers," the bill continues, "that the Bee and barges are not accountable for sinking or damage to barge, except from gross carelessness."

It was alleged by plaintiffs that defendants had neglected to deliver the barge and her valuable cargo according to their contract. The defendants answered by a general denial, and by a recital of what they claimed to be the circumstances of the loss of the barge and cargo, in which they contended they were without blame; and that the loss did not result from gross carelessness on their part, and they were not liable under the bill of lading. Other defenses were raised by the answer, which have been abandoned.

The court *a qua* gave judgment for plaintiffs for the amount claimed as the value of the barge and cargo, \$15,272.60, with interest from judicial demand, and defendants appealed.

The appellants contend, as stated in their printed argument:

"*First.* That they are not common carriers, or rather that their undertaking in this, or like cases, is not that of a common carrier.

"*Second.* That they are liable, if liable at all, only in case of gross carelessness.

"*Third.* That the restriction of liability contained in the agreement to tow the barge in question exonerates them, except in case of gross carelessness — as the appellants were bound to use but ordinary prudence, even if they were common carriers.

"*Fourth.* That the judgment rendered is for a larger amount than the testimony will authorize."

The question whether a tow-boat, under the circumstances of this particular case, is a common carrier has been long settled in the affirmative in Louisiana; and the reasoning by which Judge MATTHEWS supported this conclusion in the leading case of *Smith v. Pierce*, 1 La. 354, is worthy of the sagacity for which that jurist was pre-eminent. The same opinion was clearly intimated by the

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supreme court of Massachusetts in the case of *Sproul v. Hemmingway*, 14 Pick. 1, in which Chief Justice SHAW was the organ of the court.

In the case of *Alexander v. Green*, 7 Hill, 533, the court of errors of New York seem to have been of the same opinion. Four of the senators, in giving their reasons, distinctly state their belief that the tow-boat in that case was a common carrier, and Judge MATTHEWS' decision is referred to in terms of commendation as a precedent. It is true that Mr. Justice BRONSON, whose opinion was thus reversed in a subsequent case, declares (2 Com. 208), that nobody could tell what the court of errors did decide in *Alexander v. Green*, but the facts remain as above stated, and the effect of the case cannot but be to fortify the authority of the decision in 1 La.

In addition to these authorities, we have the weighty opinion of Mr. KENT, who includes "steam tow-boats" in his list of common carriers (2 Kent, 599), and of Judge KANE in 13 Law Rep. 399. On the other hand, Judge STORY seems to be of a different opinion (Bail., § 496), and Mr. Justice GRIER differed from Judge KANE.

So, too, the supreme court of New York, in *Caton v. Rumney*, 13 Wend. 387, and *Alexander v. Green*, 3 Hill, 9; the court of appeals of the same State in *Well v. Steam Navigation Company*, 2 Com. 207; the supreme court of Pennsylvania in *Leonard v. Hendrickson*, 18 State, 40, and *Brown v. Clegg*, 63 id. 51; and the supreme court of Maryland in *Penn. Co. v. Sandridge*, 8 Gill & Johns. 248, decided that tug-boats, in these particular cases, were not common carriers. We are informed that the same decision was made in the case of the *Neafie*, lately decided in the United States circuit court in New Orleans.

Such conflict of authority might be very distressing to the student, but for the fact that, when these writers and cases cited by them are examined, the discrepancy, except in the decision in 63 Penn., is more imaginary than real. There are two very different ways in which a steam tow-boat may be employed, and it is likely that Mr. Story was contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed *termini*. Such were the facts in some form as stated or

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assumed in *Caton v. Rumney*, 13 Wend., and *Alexandria v. Greene*, 3 Hill, cited by Judge STORY in the case of the *Neafie*, and in the cases above quoted from 2 Comstock, 18 Penn. State, and 8 Gill & Johnson; and it may well be said that under such circumstances the tow-boat or tug is not a common carrier. But a second and quite different method of employing a tow-boat is where she plies regularly between fixed *termini*, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. Story on Bail., § 495. And it was probably to a tow-boat employed in this way that Mr. Kent referred in the passage quoted above; and that the supreme court of Massachusetts had in mind in the 14 Pickering; and see also *Davis v. Housen*, 6 Rob. 259, and *Clapp v. Stanton*, 20 An. 495. We must think that in all reason the liability of the defendants, under such circumstances, should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug.

But conceding that this case as a contract of affreightment must be determined by the law of Missouri (4 Martin, 584), and that by that law the defendants are not common carriers as to the plaintiffs, we think it clear from the evidence of the defendants' own witnesses that they were guilty of "gross carelessness" in their attempt to deliver the plaintiffs' barge with its cargo at the port of New Orleans, and that by this gross carelessness she was sunk, and, with her cargo, destroyed.

What is "gross carelessness?" In an employment requiring skill, it is the failure to exercise skill. *New World v. King*, 16 How. 475. The employment of the defendants certainly required skill. A lack of that dexterity which comes from long experience only might be swiftly fatal, for but a single plank intervenes between the costly cargo and instant destruction. We have but to read the testimony of defendants' own witnesses, and especially Conley, Turner, Burdeau, and Sylvester, to see that the attempt to land the barge was made without skill, and that it might easily have been effected with entire safety.

We are of opinion that the judgment was correctly rendered in favor of plaintiffs, but that the amount is somewhat excessive. We find the value of the property lost at this port, less the freight and

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charges, and a small amount realized from the wreck, to be \$13,268.50.

It is therefore ordered that the judgment appealed from be amended by reducing the amount thereof to the sum of \$13,268.50, with legal interest from judicial demand and costs of the lower court, and that as thus amended it be affirmed, appellees to pay costs of appeal.

LEVY V. BANK OF AMERICA.

(24 La. Ann. 220.)

Banking — check.

A bank is not required to know any of the persons who indorse a check drawn upon it, except the one who presents it for payment, nor is it authorized to withhold payment until it is furnished with direct proof that the signatures of the indorsers preceding the one presenting it are genuine. In cases of this kind the rule is that the bank must know that the signatures of the drawer and the person who presents it for payment are genuine, under penalty of liability to pay it again in case either of the signatures are shown to be a forgery. But if it be shown that the signatures of the indorsers which precede that of the one receiving payment is a forgery, the bank can not on that account be held to a second payment.

APPEAL from the seventh district court.

Collens, J. Hyams & Jonas, for plaintiffs and appellants.

Johnson & Denis, for defendant and appellee.

HOWELL, J. The plaintiffs, who are brokers and dealers in State warrants, etc., purchased of a man unknown to them a State warrant for \$900, drawn to the order of and indorsed by Charles H. Merritt, the secretary of the State Senate, for which they gave their check for \$720 on the Bank of America (where they kept a deposit account), drawn first to bearer, but changed by them before delivery to the order of said Merritt. This change was made after the stranger was asked if he was Charles H. Merritt and replied affir-

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matively, the object being, as stated, to make him identify himself to the bank. This check, bearing the name of Charles H. Merritt on its back, was taken by Isidore Newman, a broker, keeping an account also with the defendant, in exchange for coin and currency, and by him deposited, with his indorsement on it, with the Bank of America, its amount being credited to him and charged to the plaintiffs. The State warrant passed through several hands and was finally, some four or five months after the above transaction, presented by one of the tax collectors to the auditor, when it was found to have been changed from the sum of \$100 to \$900. From each successive holder it reverted to the plaintiffs, who found then that the indorsement of Charles H. Merritt was forged upon their check. They now sue the bank for having paid the check on this forged indorsement. The bank called Newman in warranty. The district court gave judgment in favor of the bank on the authority of the case of *Smith v. Mechanics and Traders' Bank*, 6 An. 610; and the plaintiffs appeal. They call in question the correctness of the doctrine of that case, but contend that it differs entirely from the one at bar, upon the point considered by the supreme court as of the first importance, to wit: That Smith in drawing his check to the order of the supposed acceptors of the bill purchased by him and not to the order of the holder from whom he purchased, was deviating not only from the usual course of business, but from his own long-established and regular custom; while in this case the plaintiffs draw their check according to the ordinary usual course of business, to the order of the payee of the warrant purchased, whose genuine indorsement was on it at the time. This difference does not seem to us to be such as to greatly benefit the plaintiffs. In each case the instrument purchased was a forgery at the time of the purchase, and the purchasers issued their checks in payment thereof to unknown persons, but in the name of the payee alike of the forged instruments, with the acknowledged purpose of throwing upon the bank the responsibility of paying to the right party. In each case the signature to the check was genuine, and the checks were given to the guilty parties or their accomplices, who have easily and successfully deceived the drawers of the checks, who it seems had some suspicions as to the identity of the parties with whom they were dealing; as said in the *Smith* case, the first fault was committed by the plaintiffs in taking the forged or false instrument, and placing their check in the hands of a party who

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had every interest to use it as an implement of fraud. The plaintiffs cannot successfully complain that the bank failed to protect them from the devices of a person who had, with so little effort, deceived and defrauded them. If the warrant purchased by them had been genuine, we presume they would not have complained of the payment of their check by the bank to any other party than Merritt, in whose favor it was drawn by them. It seems to us they are endeavoring to make the bank repair a loss which they brought on themselves by their own carelessness.

There is a feature in this case which makes it a stronger case in favor of the bank than the Smith case: It is that the bank in this instance paid on the genuine indorsement of the party presenting it for payment, the indorsement of Newman. We are aware of no law or custom which makes banks responsible primarily for the genuineness of every indorsement which may appear on checks drawn on them. We apprehend that they are not required to suspend payment until they are furnished with direct proof, that each indorsement preceding that of the party presenting or depositing it, is genuine. They must know the party to whom they pay and the signature of the drawer.

The authorities cited by plaintiffs come under the general rule, that banks pay checks to order at their own risk, when their customers, in drawing the checks, have done nothing on their part to create or increase that risk, as in this case.

Judgment affirmed.

STATE ex rel. MISSISSIPPI VALLEY NAVIGATION COMPANY v. WARMOTH, Governor.

(24 La. Ann. 851.)

Mandamus against the governor.

The governor of the State cannot be compelled by mandamus to perform acts required by law to be done by him. (See note, p. 128.)

APPEAL from the eighth district court.

John H. New, for plaintiff and appellee.

Semmes & Mott, for defendant and appellant.

State ex rel. Mississippi Valley Navigation Co. v. Warmoth.

TALIAFERRO, J. The relators applied to the sixth district court of New Orleans for a mandamus to compel the governor of the State to subscribe, in the name of the State, to the capital stock of the Mississippi Valley Navigation Company of the South and West, one thousand shares of one hundred dollars each, in pursuance of an act of the legislature, taking effect in March, A. D. 1870. A rule *nisi* was granted, and the governor answered that he had decided not to exercise the authority vested in him by the act incorporating the company appearing herein as relators, for the reason that he believes and entertains the opinion that the best interests of the State would be subserved by withholding the subscription authorized by that act. He further answered that the constitutional limitation of the power of the State to contract debts having been adopted in December, 1870, and the limit of twenty-five millions of debt having been reached, the authority vested in the respondent was revoked by the adoption of the constitutional amendment limiting the State debt.

It is contended on the part of the respondent, that the act vests a mere authority in the governor to subscribe for the stock, and as that authority was not exercised prior to the adoption of the constitutional amendment limiting the State debt, he cannot now exercise it if he deemed it proper. The rule was made absolute by the court *a qua*, and the respondent has appealed. On the part of the relators it is argued that where a public officer or body is clothed with power to do an act which concerns the public interest, or the rights of third persons, the execution of the power may be insisted upon as a duty, although the statute creating it be only permissive in its terms. On the other hand it is held, that this doctrine is inapplicable in the present case, because no private right of the relator is involved, and no public rights are concerned — that this act is a mere authority given by the State to one of its own officers to make a contract with a private corporation. The interest of that corporation may be promoted by making the contract with the State, but it has no legal right to compel the State to make the contract.

It is not necessary to determine whether terms merely permissive, used in a statute, are in all cases to be held to be mandatory. Neither do we feel it incumbent upon us to go into the consideration of the character of the act required to be performed by the

respondent as being merely ministerial, or otherwise, or to investigate the reasons assigned by him for declining to act.

We had occasion in the case of the State on the relation of *Oliver and others v. The Governor of the State*, 22 An. 1, 2 Am. Rep. 712, to go at some length into the inquiry as to the power of the judiciary to compel by mandamus the chief executive officer of a State to perform acts required by law to be done by him. We then concluded that such a power is not vested in the judiciary, and we see no good reasons for receding from the views then taken of this subject. 4 Wall. 500 and 501.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the rule be discharged at the relator's costs.

Rehearing refused.

NOTE. — To the same effect are *Hawkins v. Governor*, 1 Ark. 570; *State v. Governor*, 25 N. J. 331; *People v. Bissell*, 19 Ill. 229; *Dennett, Petitioner*, 32 Me. 510; *Mauren v. Smith*, 3 R. I. 192; 5 Am. Rep. 564; and the supreme court of Michigan has recently decided in *People v. Bagley*, not yet reported, that a State governor cannot be compelled by mandamus to perform an official act even though private rights of property may depend upon it, whether the duty to perform the act is imposed by the constitution or by statute. There are, however, other cases holding that a governor may be compelled, like other public officers, to perform an act clearly defined and enjoined by law, and which is ministerial, and neither involves any discretion nor leaves any alternative. *Pacific Railroad v. Governor*, 23 Miss. 353; *Chamberlain v. Sibley*, 4 Minn. 309; *Cottin v. Ellis*, 7 Jones' Law (N. C.), 545; *State v. Governor*, 5 Ohio St. 529; *State v. Moffatt*, 5 Hum. (Ohio) 358; *Bonner v. Pitts*, 7 Ga. 473. See, also, *Marbury v. Madison*, 1 Cranch, 170.—**REP.**

HUBBARD V. MOORE.

(24 La. Ann. 591.)

Contract—immoral. Sales to keeper of houses of prostitution.

A dealer in furniture or other articles of commerce has the right to trade with and make sales of furniture to a person engaged in keeping a house of prostitution, and the courts will enforce such right by compelling the person who purchases the furniture to pay for it, although it be shown that the vendor knew at the time of the sale the use to which the furniture was to be applied.

APPEAL from the fifth district court.

Hubbard v. Moore.

L. Madison Day, for plaintiff and appellant.

J. Ad. Roxier and *M. Du Buisson*, for defendant and appellee.

TALIAFERRO, J. The plaintiff sues for \$2,167.15, with interest, being an alleged balance due him of the price of a lot of furniture sold by him to the defendant.

The answer is a general denial. The purchase of the furniture is admitted, but the defendant avers that she purchased it to be used in a house of prostitution kept by her, and that the same was to be paid for from time to time as she might be able to do by success in business, but failing in which she is unable to discharge the debt.

She alleges that the contract entered into by her and the plaintiff in regard to the furniture is one reprobated by law and contrary to good morals.

There was judgment in the court below dismissing the plaintiff's action as of nonsuit, and he has appealed.

The evidence, we think, sufficiently establishes that the plaintiff, when he sold the furniture to the defendant, was aware of her character and business, but it fails to show that in supplying her with furniture there was any intent on his part to aid or sanction her course of vice and abandonment. He lived in Cincinnati. The furniture, it seems, was sold at different times, much the larger lot of it by the plaintiff's agent in New Orleans. A portion of it was sold by the plaintiff himself when on a visit to this city. The defendant was allowed a credit to make payments, and she did pay amounts at different times, making an aggregate of \$380. The plaintiff had furniture to sell, and his object was to find buyers; the money of the cyprian was as useful to him as that of any other person. That he entered into a contract with the defendant to benefit himself at the expense of morals we are by no means satisfied. The allegations of the defendant's answer, aiming to create the impression that he promoted the interests of the defendant by supplying her with furniture on terms of credit to facilitate her success in a career of vice and infamy on her part, in order thereby that he might be benefited himself, are not made good by proof. We cannot attribute such a motive to him. Clearly a distinction ought to be drawn between acts done manifestly in derogation of public morals and purposely to promote vice and immorality, and acts not having such manifest purpose or tendency but which

might remotely and indirectly be auxiliary to that object. In acts of the latter class there would be no absolute violation of public morals. A *turpis causa* would not arise in such a case to vitiate a contract in which the offense against morals would be merely conjectural. To the vicious and depraved, as well as to the good and the virtuous, belong the right to acquire the needs and comforts of a common humanity. A different doctrine would adopt the visionary notion that "there is to be no more cakes and ale." The fair dealer who by lawful contract furnishes the dissolute with the necessities and conveniences of life should not be debarred the right of enforcing payment for his goods by the effrontery of his vendee asserting in a court of justice that the things furnished were obtained for the express purpose of putting them to disreputable uses. The seller who furnishes an article adapted to a legitimate and proper purpose is not responsible in a court of morals, and much less in a court of law, for a subsequent perversion of its use by the buyer. In the case at bar it is shown that the furniture was sold at cash prices, with time given for payment. The seller, there is no doubt, knew that it was to be used in a house of ill-fame, but how his knowledge of that fact involves him in the guilt of the inmates of that house, as an aider and abetter of lewdness and depravity, we think is not apparent. Although it is not shown that when he delivered the furniture he told the defendant to go her way and sin no more, it is not thence to be inferred that he encouraged her in continuing in her immoral course of life. That he contributed to enable her to continue it by selling her the furniture is too vague, hypothetical and remote to form an impediment to his recovery on the contract.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendant \$2,167.15, with legal interest from judicial demand. It is further ordered that the plaintiff's priority of lien and privilege upon the property attached be recognized, and that the same be sold according to law and its proceeds applied to the payment of this judgment — the defendant and appellee paying costs in both courts.

HOWELL, J., dissented.

State ex rel. Attorney-General v. Doherty.

STATE ex rel. ATTORNEY-GENERAL V. DOHERTY.

(25 La. Ann. 119.)

Officer — removal of by governor.

Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected.

INFORMATION to restrain the defendant from administering an office.

Hornor & Benedict and *W. W. Howe, S. Belden*, attorney-general, and *A. A. Atocha*, for plaintiff and relator.

Hays & New and *T. & J. Ellis*, for defendant and appellee.

WYLY, J. The attorney-general, on the information of Joseph L. Tharp, brings this suit in the name of the State, under the intrusion act, against the defendant for the office of tax collector of the sixth district of the city of New Orleans, praying that said Tharp be decreed entitled thereto, and that the defendant be restrained by injunction from administering said office, and that he be condemned to deliver to the relator certain books and other property belonging to the State and appertaining to said office.

The defendant pleaded the general issue, and averred that he is the sole and lawful tax collector for said district, having been duly commissioned, qualified, and inducted into said office according to law.

The case was tried by a jury, and the result was a judgment on their verdict in favor of the defendant. The plaintiffs appeal.

It appears that the defendant was appointed tax collector for the sixth district of the city of New Orleans on the 5th of March, 1872; and the relator was appointed to said office on the 8th June, 1872, the commission of the latter reciting that he was appointed "*vice T. Doherty removed*."

The question is, had the governor authority to remove the defendant and appoint the relator?

Section 1593 of the Revised Statutes of 1873 declares that "any

assessor or member of the board of assessors, or tax collector of the city of New Orleans, or any State collector, refusing or failing to do his duty, as prescribed by this act, shall be liable to dismissal from office by the governor."

When the governor removed the defendant and appointed the relator, he decided that the defendant had failed or refused to do his duty, because it was in this contingency only that he had the right to remove him. However erroneous the decision of the governor as to that question may be, we do not think it can, under our system of government, be examined by the courts.

The legislature created the office; and the law provided that the governor might make the appointment, and for a certain cause remove the officer appointed by him.

Here the law invested the governor with a discretionary power, which could alone be employed by him. The decision of all the courts of the State could not compel him to make the removal.

The removal of the defendant for neglect of duty was the exercise of executive discretion. The grant of power to the executive to remove an officer for a certain cause implies authority to judge of the existence of that cause.

The power vested exclusively in executive discretion cannot be controlled in its exercise by any other branch of the government. "The powers of the three departments are not merely equal, they are exclusive in respect to the duties assigned to each." *Wright v. Defrees*, 8 Ind. 302.

"The policy of our constitution and laws has assigned to the different departments of the State government distinct and different duties, in the performance of which it is intended that they shall be entirely independent of each other, so that whatever power or duty is expressly given to or imposed upon the executive department is altogether free from the other branches of the government." *Attorney-General v. Brown*, 1 Wis. 522.

To institute the inquiry as to the correctness of the cause for which the governor removed the defendant would be a direct attack upon the independence of the executive, "and a usurpation of power subversive of the constitution." See Cooley's Constitutional Limitations, 187, and authorities there cited.

The defendant contends, however, that the governor had no authority to remove him under section 1593 of the Revised Statutes of 1870; because, by section 92 of act No. 42 of the statutes of

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1871, the auditor of public accounts, upon evidence of embezzlement, breach of trust or fraud, is required to "cause the arrest of such collector," whose official functions shall thereupon be suspended, and "the governor immediately, on such arrest, shall proceed to appoint some competent and trustworthy person." * * *

The repealing clause of this statute only repeals all laws "contrary to or inconsistent" therewith.

The statute of 1871, creating the additional remedy for embezzlement, breach of trust or fraud on the part of the collector, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not, therefore, repealed by the former.

The case of *Downes v. Towne*, 21 An. 490, cited by the defendant, is no authority in his behalf; because Downes held a constitutional office, of which he could not be deprived according to the constitution, except by address or impeachment.

It is, therefore, ordered that the judgment appealed from be annulled; and it is decreed that there be judgment for the plaintiff, condemning the defendant to restore to the relator all the books and other property appertaining to the office of tax collector of the sixth district of the city of New Orleans, and also restraining him from exercising or attempting to exercise the duties of said office, and decreeing that the relator is entitled to administer said office. It is further ordered that the defendant pay costs of both courts.

Rehearing refused.

AVEGNO V. HART.

(25 La. An. 285.)

Highway—law of the road.

When a driver attempts to pass another going in the same direction on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself. (*See note, p. 185.*)

APPEAL from a judgment for the plaintiff.

Koontz & Elliott, for plaintiff and appellee.

Hornor & Benedict, for defendant and appellant.

MORGAN, J. The thoroughfares of the city of New Orleans were never intended for race-courses.

The plaintiff, driving on Canal street, was run into by the defendant, who was racing with a competitor and, with his companion, was thrown from his buggy, which was badly damaged, and he and his friend much disturbed thereby in mind and body.

He sued the defendant for \$400 special damages, and for \$500 damages to his feelings. The judge gave him a judgment for \$350, and the defendant has appealed.

Avegno seems to have been about the middle of the street. Janny and Hart were racing behind him, and seem to have been close together, Janny somewhat ahead. Janny passed Avegno on the left; Hart attempted to pass him on the right. This was not Hart's proper place.

We understand the law of the road in this country to be that when a driver attempts to pass a vehicle which is going in the same direction with himself, he must go to the left; when they meet, each must go to the right. So well is this rule understood that horses, well trained, are governed by it without any guiding. It is established in this case, that plaintiff's horse is in the habit of going to the right. And so it would appear that Avegno, when Janny passed him, pulled to the right. This was proper for him to do; and it was most natural that he should, for he could well take it for granted that Janny's competitor, who was close behind him, would follow in Janny's track, and he was certainly justifiable in endeavoring to get as far out of the way of these reckless drivers as possible.

Besides, we take it that when a driver attempts to pass another on a public road, he does so at his peril; at least, that he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself. In this case, instead of being reckless or careless, the plaintiff did every thing he could to protect himself from harm — and all without success. The defendant has no one to blame but himself, so

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much so that if the plaintiff had asked for it, we would have increased the damages. As it is, we can only affirm the judgment.

Judgment affirmed.

NORM.—The universal custom in this country is for travelers in vehicles to take the right hand of the road in meeting each other, if it is reasonably practicable so to do, and this rule is prescribed by statute in some of the States, as in New York. 1 R. S. 693. These statutes usually provide that travelers shall pass to the right of the "center of the road." This does not mean the center of the smooth or most traveled part of the road, but the center of the *worked* part. *Earing v. Lansing*, 7 Wend. 185; *Palmer v. Barker*, 3 Fairf. 238; and this is true, although the smooth part be entirely on one side of that center. *Id.* This rule requiring passengers to keep to the right of the center of the worked part of the road does not apply in winter when the depth of snow renders it impossible or difficult to ascertain that center; at such time it will be sufficient to keep to the right of the center of the beaten or traveled track. *Smith v. Dygert*, 12 Barb. 618; *Jaquith v. Richardson*, 8 Metc. 213.

The English law of the road is that travelers in vehicles meeting shall keep to the left but this is not inflexible, although one varying from it is held bound to exercise a greater degree of care to avoid collision than he would be had he adhered to it. In *Wade v. Carr*, 3 Dowl. & Ry. 255, the defendant's carriage was on the wrong side of the road, and in attempting to pass on that side collided with the plaintiff's carriage, and the court held that it was for the jury to decide the question of negligence without regard to the law and usage of the road. See, also, *Turley v. Thomas*, 8 Car. & Payne, 103. The fact that one traveling with a vehicle was on the wrong side of the road at the time of a collision is *prima facie* evidence of negligence on his part, but it may be explained and justified; as that he was about to turn up to a house or a store, or to water his horse. See *Burdick v. Worrall*, 4 Barb. 596.

But one is not justified in rigidly adhering to his side of the road if he could otherwise avoid a collision. *Brooks v. Hart*, 14 N. H. 307; *O'Malley v. Dorn*, 7 Wis. 236; *Parker v. Adams*, 12 Metc. 415; *Smith v. Gardner*, 11 Gray, 418; *Johnson v. Small*, 5 B. Monr. 25. One on the wrong side of the road assumes risk of collision and will be liable for injuries occasioned to another traveler approaching on the right side of the road with ordinary care. *Brooks v. Hart*, *supra*; *Burdick v. Worrall*, 4 Barb. 596; *Pluckell v. Wilson*, 5 Carr. & P. 875; *Spofford v. Harlen*, 8 Allen, 176. The law of the road does not apply to one traveling on horseback. *Dudley v. Bolles*, 24 Wend. 465; but he must give way to a heavily laden vehicle. *Beach v. Parmenter*, 23 Penn. St. 193; *Washburn v. Tracy*, 2 Chip. 136.

In this country there is no law of the road as to travelers in the same direction, and the leading traveler is not bound to turn either to the one side or the other to allow the other to pass, provided there be sufficient room to pass on the one hand or the other. They must pass each other in such manner as may be most convenient. *Bolton v. Colder*, 1 Watta, 200. — REP.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

VAN VALKENBURGH, appellant. v. BROWN.

(43 Cal. 43.)

Constitutional law — females not entitled to vote.

Women are not entitled to vote by virtue of the 14th or 15th amendments to the constitution of the United States.

MANDAMUS. The opinion states the facts.

Albert Hagan, for appellant.

Albert Heath, for respondent.

WALLACE, C. J. The plaintiff applied to the court below for a writ of mandamus against the defendant, who is the county clerk of the county of Santa Cruz, to compel him to inscribe her name in the great register, and enroll her as a legal voter of said county. Judgment having been rendered refusing the writ, she brings this appeal.

It appears that she is “a white female resident and citizen of the United States and of the State of California, over the age of twenty-one years, and for more than one year last past a resident of Santa Cruz county,” and was born within the limits and subject to the jurisdiction of the United States.

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The court below held that by reason of her sex she was disqualified to exercise the elective franchise; and it is admitted that if her claim in that respect is to be determined alone by the constitution and laws of this State excluding, as they do, persons of her sex from the exercise of the elective franchise, the judgment below is correct, and should be affirmed here.

But it is claimed that she is entitled to registration as a voter by reason of the first section of the recent amendment to the federal constitution of July 20, 1868, known as the fourteenth amendment. That section is in the following words:

“Article 14, section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

1. It is claimed that the plaintiff is a citizen of the United States and of this State. Undoubtedly she is. It is argued that she became such by force of the first section of the fourteenth amendment already recited. This, however, is a mistake. It could as well be claimed that she became free by the effect of the thirteenth amendment, by which slavery was abolished, for she was no less a citizen than she was free before the adoption of either of these amendments. No white person born within the limits of the United States, and subject to their jurisdiction, or born without those limits, and subsequently naturalized under their laws, owes the status of citizenship to the recent amendments to the federal constitution. The history and aim of the fourteenth amendment is well known, and the purpose had in view in its adoption well understood. That purpose was to confer the status of citizenship upon a numerous class of persons domiciled within the limits of the United States, who could not be brought within the operation of the naturalization laws because native born, and whose birth, though native, had at the same time left them without the status of citizenship. These persons were not white persons, but were, in the main, persons of African descent, who had been held in slavery in this country, or, if having themselves never been held in slavery, were the native-born descendants of slaves. Prior to the adoption of

the fourteenth amendment it was settled that neither slaves, nor those who had been such, nor the descendants of these, though native and free born, were capable of becoming citizens of the United States. *Dred Scott v. Sanford*, 19 How. 393. The thirteenth amendment, though conferring the boon of freedom upon native-born persons of African blood, had yet left them under an insuperable bar as to citizenship; and it was mainly to remedy this condition that the fourteenth amendment was adopted.

This is recent history — familiar to all.

2. It is next claimed that, by whatever means the plaintiff became a citizen of the United States, her privileges and immunities as such citizen cannot be abridged by State laws; and this is true. The purpose and the effect of the amendment, in this respect, is to place the privileges and immunities of citizens of the United States beyond the operation of State legislation. Those immunities and privileges, whatever they may be, are guaranteed and protected in every State by this clause in the federal constitution.

3. It is urged that, among these privileges and immunities, is included the privilege of the plaintiff to exercise the elective franchise within the limits of this State, even in disregard of the constitution and laws of the State, which unquestionably exclude persons of her sex. And this brings us to inquire what is meant by the phrase “privileges or immunities of citizens of the United States,” as used in this amendment.

This phraseology was known in our history anterior to the formation of the present federal union. In the articles of confederation between the American States it was provided “that the free inhabitants of each of these States (paupers, vagabonds, and fugitives from justice excepted) shall be entitled to all privileges and immunities of free citizens of the several States, and the people of each State shall, in every other, enjoy all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively,” etc. Art. IV. The term “privileges and immunities” was therefore not a new one when, in the second section of the fourth article of the federal constitution, as originally ratified, it was declared that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” The words “*privileges and immunities*” had at that time acquired a distinctive meaning and a well-known signification. They comprehended the enjoyment of life

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and liberty, and the right to acquire and possess property, and to demand and receive the protection of the government in aid of these. They included the right to sue and defend in the courts, to have the benefit of the writ of habeas corpus, and an exemption from higher taxes or heavier impositions than were to be borne by other persons under like conditions and circumstances.

The federal constitution went into operation in March, 1789, and within a few years thereafter—in 1797—a question came before the general court in Maryland in respect to the meaning of the words “privileges and immunities” as thus employed in that instrument. The question was argued by the most eminent counsel in the State, and among them was the celebrated Luther Martin, then attorney-general. Upon this point the court said: “Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege. The peculiar advantages and exemptions contemplated under this part of the constitution may be ascertained, if not with precision and accuracy, yet satisfactorily. By taking a retrospective view of our situation antecedent to the formation of the first general government, or the confederation, in which the same clause is used *verbatim*, one of the great objects must occur to every person, which was the enabling of the citizens of the several States to acquire and hold real property in any of the States, and deemed necessary, as each State was a sovereign and independent State, and the States had confederated only for the purposes of general defense and security, and to promote the general welfare. It seems agreed from the manner of expounding or defining the words ‘immunities and privileges’ by the counsel on both sides, that a particular and limited operation is to be given to those words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding office, the right of being elected. The court are of opinion it means that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected,” etc. *Campbell v. Morris*, 3 Harr. & McH. 554.

The expression, “privileges and immunities,” had been found in the constitution for a period of near eighty years prior to the adoption of the fourteenth amendment, and had never been supposed to

include the right to the exercise of the elective franchise. Notwithstanding the citizens of each State were, during all that time, entitled to all the privileges and immunities of citizens in the several States, it was never supposed that the citizen of any State might, upon his removal into any other State, lawfully claim to vote there because he had exercised that privilege in the State from which he had just emigrated.

In point of fact the States have generally conferred the privilege of the elective franchise upon such of their male inhabitants as had become citizens of the United States, if of the requisite age, etc. This circumstance has given rise to a notion in some quarters that the privilege of voting and the status of citizenship are necessarily connected in some way — so that the existence of the one argues that of the other. But the history of the country shows that there was never any foundation for such a view. Thus citizens of the United States, resident in the State of Virginia, were prevented by State law from voting there, unless seized of a freehold estate; and citizens of the United States, resident in Massachusetts, were by the laws of that State denied the privileges of the elective franchise, unless owners of personal property to a designated amount. While the privilege of voting was thus, by State laws, withheld in those States from persons who were citizens of the United States, the elective franchise was in other States of the union conferred by State laws upon persons who were not citizens. In New York and North Carolina, for instance, at an early day the privilege of voting was conferred upon negroes, persons of African descent, under certain conditions. These were not citizens of the United States, nor then even capable of becoming such. In Wisconsin and Michigan, though negroes were excluded, persons of the Indian blood were admitted; and in Indiana, Illinois, Minnesota, and other States, unnaturalized foreigners were by State laws allowed to vote — following, in this respect, the early policy of the federal government, who, in the ordinance of 1787, for the government of the north-western territory, had permitted the elective franchise to the unnaturalized French and Canadians, of whom the population of that territory was then largely composed. It will be found that, from the earliest periods of our history, the State laws regulated the privilege of the elective franchise within their respective limits, and that these laws were exactly such as our local interests, peculiar conditions, or supposed policy dictated, and that it

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was never asserted that the exclusion of any class of inhabitants from the privilege of voting amounted to an interference with the privileges of the excluded class as citizens. As was well said by Judge MILLS, of the court of appeals of Kentucky: "The mistake on the subject arises from not attending to a sensible distinction between political and civil rights. The latter constitute the citizen, while the former are not necessary ingredients. A State may deny all her political rights to an individual, and yet he may be a citizen. The rights of office and suffrage are political purely, and are denied by some or all the States to part of their population, who are still citizens. A citizen, then, is one who owes the government allegiance, service, and money by way of taxation, and to whom the government, in turn, grants and guarantees liberty of person and of conscience; the right of acquiring and possessing property; of marriage and the social relations; of suit and defense, and security in person, estate, and reputation. These, with some others which might be enumerated, being guaranteed and secured by government, constitute a citizen. To aliens we extend these privileges by courtesy; to others we secure them — to male as well as female — to the infant as well as the person of hoary hairs." 1 Litt. 342.

4. But the language of the *second* section of the fourteenth amendment itself demonstrates that the elective franchise is not one of the "privileges or immunities" mentioned in the *first* section, and as such not to be abridged or taken away by State laws.

The second section of the amendment (so far as material upon this point) is in the following words:

"Section 2. Representatives shall be apportioned among the several States, according to their respective numbers. But when the right to vote * * * is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, * * * the basis of representation therein shall be reduced," * * * etc.

It will thus be seen that, by this second section of the fourteenth amendment, it is expressly provided that if the State law shall deny the elective franchise to the citizens of the United States therein mentioned, the basis of federal representation to which such State would otherwise be entitled, shall be thereupon, and in consequence of such denial, readjusted and reduced in a designated ratio. If the power of the State to deny the elective franchise to a citizen of the United States had been absolutely taken away by the first sec-

tion, then a State law enacted for that purpose would necessarily be absolutely void; as a bill of attainder passed, or *ex post facto* law enacted, would be void, as being in contravention of the inhibitions of article 1, section 10, of the federal constitution. But by the second section of the amendment under consideration it is provided that the action of the State authority denying the right of citizens of the United States to vote, so far from being null and void, shall furnish a new basis of federal numbers in the State, upon which a new apportionment of representation in congress is to follow. It is inconceivable that such constitutional consequences are to follow the doing of an act which the constitution had just forbidden to be done at all.

5. The fifteenth amendment to the constitution was adopted nearly two years after the fourteenth. It provides that the right of a citizen of the United States to vote shall not be denied on account of *race*, color, or *previous condition of servitude*. If, under the fourteenth amendment already adopted, the right of a citizen to vote was not to be denied upon *any ground whatsoever*, what necessity or propriety in subsequently providing that it should not be denied upon either of three enumerated grounds? It will be seen that the construction claimed for the fourteenth amendment by the counsel for the plaintiff would leave nothing for the fifteenth to operate upon.

Many other and hardly less cogent reasons might be mentioned going to show that the elective franchise is not one of the immunities or privileges secured by the first section of the fourteenth amendment. The mere power of the State to determine the class of inhabitants who may vote within her limits was not curtailed in the fourteenth amendment.

The fifteenth amendment took away her authority to discriminate against citizens of the United States on account of either race, color, or previous condition of servitude; but the power of exclusion upon all other grounds, including that of sex, remains intact.

Judgment affirmed.

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PEOPLE V. EDDY, appellant.

(43 Cal. 881.)

Constitutional law — exempting mortgages from taxation.

A State constitution provided that "all property in this State shall be taxed in proportion to its value." *Held*, that an act exempting mortgages and debts secured by mortgages from taxation was in violation of the constitution, and void.

ACTION for the recovery of taxes. The opinion states the case.

A. C. Niles, Dibble & Byrne, and J. M. Wilson, for appellant, to the point that the term "property," as used in the constitution, did not embrace debts or choses in action, cited *Bank of the U. S. v. Huth*, 4 B. Mon. 449; *Johnson v. City of Lexington*, 14 id. 657; *City of Covington v. Elliston*, 2 Metc. (Ky.) 231; *City of Louisville v. Henning*, 1 Bush (Ky.) 381; *Livingston v. Hollenbeck*, 4 Barb. 11; *City of Buffalo v. Le Couteulx*, 15 N. Y. 452-3; *Le Couteulx v. Supervisors of Erie*, 7 Barb. 250; *Boreel v. City of New York*, 2 Sandf. Sup. Ct. 557; *People v. Board of Supervisors*, 39 N. Y. 87; *Mohawk & H. R. R. Co. v. Chute*, 3 Paige, 39; *Dewitt v. Hayes*, 2 Cal. 468; *Fleming v. Brooks*, 1 Sch. & Lef. 318; *Stuart v. Marquis of Bute*, 11 Ves. 657; *Milton v. Race*, 1 Burr. 452; *Chapman v. Hart*, 1 Ves. Sen. 273; *Countess of Alesbury's Case*, id.; *Mr. Wortley's Will*, 5 Bro. Parl. C. 534; *Moore v. Moore*, 1 Bro. C. C. 127; *Mann v. Executors of Mann*, 1 Johns. Ch. 232.

Niles Searles, J. I. Caldwell, district attorney, and *Jo. Hamilton*, attorney-general, for respondents.

RHODES, J. This action was brought for the recovery of the taxes which were assessed upon certain solvent debts due to the defendant upon certain promissory notes, which were secured by mortgages upon real estate. The defendant demurred to the complaint, on the ground that the property was not subject to assessment or taxation under the laws of the State; and that the assessment of such property is prohibited by law. The demurrer was overruled, and the defendant appeals.

The demurrer presents the question of the constitutionality of the act of April 1, 1870, entitled "An act to prevent double taxation." (Stats. 1869-70, p. 584.) The first section of the act of April 4, 1870, to relieve owners of incumbered real estate from double taxation (*id.*, p. 710) is identical with the first section of the first-mentioned act. The second section of the latter act, which purports to make new contracts between borrowers and lenders, and the third section, which provides for the forfeiture to the State, in a certain contingency, of moneys belonging to the borrowers, are not involved in this case. The validity of only the first section of each act is drawn in question. The section is as follows: "No mortgage or lien given and held upon real estate, or the debts thereby secured, or promissory notes secured by mortgage, shall be assessed upon the books of any assessor, State, county, or otherwise." That portion of section 13, article XI of the constitution, by which the validity of the legislation in question is to be tested, is as follows: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law."

That the purpose of the first section of the act was to exempt from taxation solvent debts secured by mortgages upon real estate is, we think, beyond all question. An ingenious argument is presented by the appellant to show that such is not the purpose of the act—that it was merely to regulate the duties of assessors. It is insisted—and correctly so—that it is within the power and is the duty of the legislature to prescribe the mode in which all property shall be assessed; and it is claimed that this act is only a legitimate exercise of such power. But the argument is merely specious. Looking beyond the mere words of the act—the shadow—it is seen that the act, if enforced, effectually prevents the taxation of debts secured by mortgages upon real estate. And this is the direct effect, as we have no doubt it was the purpose, of the act. If the constitution requires this property to be taxed, the legislature, under the guise of regulating the duties of assessors, can no more exempt it from taxation than they could accomplish the same result by providing that the collector should return to the tax payer the amount collected on such property, under the pretense of regulating the duties of tax collectors. The manifest purpose of the act is to exempt such property from taxation. Its true features are quite apparent, notwithstanding its attempted disguise.

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The nature and object of the act having been ascertained, and it having been decided in *People v. McCreery*, 34 Cal. 433, that a solvent debt, whether secured by a mortgage or not, is property within the meaning of the section of the constitution relating to taxation, already cited, and the doctrine of that case that *all* property in the State is subject to taxation, and cannot be exempted by the legislature, having been repeatedly affirmed in this court (*People v. Gerke*, 35 Cal. 677; *People v. Black Diamond C. M. Co.*, 37 id. 54; *People v. Whartenby*, 38 id. 461), the case might well be left at this point. But as the discussion of some of the questions decided in those cases has been renewed by the defendant, a few of his positions will be noticed. It is insisted that the "property" mentioned in section 13 of article XI of the constitution comprises only real estate and movable property—that it is limited to tangible, visible property, and does not include choses in action. The word "property" is used in that section of the constitution in its ordinary and popular sense, and this is the general rule in the interpretation of constitutions and statutes, unless the context shows that the words are used in a technical or in some arbitrary sense.

There is no good reason to believe that the word was used in that section in a sense materially differing from that which it has in other sections of that instrument. There is a manifest propriety in giving a word the same definition in each of the sections in which it occurs, unless there is something in the context in one section showing that it has a different meaning there, from what it has in another section. The section following the one under consideration (§ 14) provides that "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property." It is apparent that the purpose of that section was to abrogate the common-law rule in respect to the right which the husband acquires by marriage in the property of the wife. At common law the husband had the right to sue for, recover, and reduce to his possession, for his own use, the choses in the action of his wife; and in case of her death, before he has reduced them to his possession, he may still proceed, as her administrator, but for his own use, to recover the same. Suppose the wife, at the time of her marriage in this State, had owned government bonds, shares of stock, certificates of deposit,

promissory notes, etc., can the husband, under the provisions of our constitution, collect the money due thereon for his own use? Had she collected, just previous to her marriage, the amount of one of her bonds in gold, it is admitted that the gold would have remained her separate property, because gold is tangible and visible; and it would require an unusual amount of hardihood to assert that the bond, had she retained it, would not have remained her separate property merely because it was a chose in action. It would almost revolutionize the law regulating the rights of husband and wife to hold that the "all property" in that section, or the sections of the statute in respect to common property, does not comprise choses in action. But the cases in this court which hold that the choses in action of the wife are her separate property are too numerous to require citation. It may safely be asserted that in no section of the constitution is the word "property" employed as comprehending only visible and tangible property, and excluding choses in action. In the first section of the declaration of rights it is declared, among other things, that all men have the inalienable right of acquiring, possessing, and protecting property." Will it be contended, in the face of this declaration, that a man has not the same right to acquire, possess, and protect choses in action as property of any other description?

In the eighth section of the same article it is provided that no person shall be "deprived of life, liberty, or *property*, without due process of law;" and that private property shall not be taken for public use without just compensation. Should the government attempt arbitrarily to seize the debt on which the tax in this case was levied, or to confiscate a State bond, the owner would confidently rely upon those provisions of the constitution for his protection.

Section 19 of the same article declares that "foreigners who are, or may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens." The foreigner who, after having been protected by the constitution in the enjoyment of his lands, should find that he was liable to be plundered of the bill of exchange which he had received on this sale of the land, because the bill was only a chose in action — only the evidence of a debt — and, therefore, not under the protection of the con-

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stitution, might well conclude that those who framed that instrument, instead of being statesmen, as we have been accustomed to regard them, were only savages whose untutored minds were incapable of entertaining the idea of any property, except such as they could both see and touch.

If legislation of this character can be sustained, why may not the exemption proceed until the whole burden of taxation is cast on one species of property? Debts secured by mortgages have now the benefit of the exemption; but by a change in the tone and temper of the legislature they might be made to bear the whole burden of the taxes. It was not intended by the framers of the constitution that the legislature, whether actuated by honest or corrupt motives, should have the power to exempt any kind of property from taxation. The exercise of the power would be dangerous. The legislature of this State, even in full view of the unmistakable injunctions of the fundamental law, have repeatedly exempted certain species of property; and it is notorious that for years one kind of property, which during a portion of the time was probably of greater value than that of any other kind, was by the power of a numerical majority exempted altogether from taxation.

There is another and a very serious objection to the act. Under the provision of the general revenue law solvent debts over and above indebtedness are subject to taxation. It is impossible to conceive of any law which is more imperatively required by the principles of good government and the just rules of political economy to be equal and uniform than a revenue law. That the burdens of taxation should rest equally upon all property within the State ought to be axiomatic, not only in theory but in practice. To enforce this rule the constitution has provided that "taxation shall be equal and uniform throughout the State." Is any argument needed in order to make it apparent that where the general law subjects all solvent debts to taxation, that another law which singles out one class of debts — whether the classification is based on the circumstance that their payment is secured by mortgages, or that they are owing to savings banks, or to a particular bank, corporation, or person, or are owing by a particular person, whether natural or artificial, or a particular class of persons — and exempts such debts from taxation, is repugnant to the constitution? If this act, with the manifest inequality which it produces when put in operation along with the general revenue law, can be upheld, no discrimina-

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tion which the legislature might devise, for the purpose of relieving a particular species or parcel of property from its proper share of the burdens of taxation, would conflict with the organic law.

Judgment affirmed.

PEOPLE v. BOWEN, appellant.

(43 Cal. 430.)

Pardoning power — restoration to citizenship — Disability to testify.

D having been convicted of criminal offenses, the governor of the State granted an executive act or proclamation, stating that "I do hereby restore said D to all rights of citizenship possessed by him before his conviction," etc. *Held*, that this was not a pardon such as would restore D's competency as a witness.

APPEAL from the county court of Sutter county.

The defendant was convicted, and appealed from the judgment and from an order denying his motion for a new trial.

The other facts are stated in the opinion.

J. G. Eastman and G. W. Tyler, for appellant.

Attorney-General Love, for respondent.

WALLACE, C. J. On the trial of the prisoner upon an indictment for the alleged crime of grand larceny, one Davis was permitted to testify as a witness. Davis had been convicted of divers felonies in the courts of the State, for which he had been adjudged to suffer and had suffered imprisonment in the penitentiary. The record of these convictions was produced by the prisoner, who thereupon objected that Davis was thereby rendered incompetent to testify in the case. It appeared by the records produced and put in evidence by the prisoner in support of his objection, that in July, 1861, by the judgment of the court of sessions of the county of Santa Clara, Davis had been duly convicted of the crime of robbery and sentenced to suffer imprisonment in the penitentiary; that in 1864 he had been duly convicted by the judgment of the

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county court of the city and county of San Francisco of the crime of burglary, and again sentenced to imprisonment in the penitentiary ; and that in 1868, in the county court of Santa Clara, he had been duly convicted of the crime of grand larceny, and by the judgment of that court again sentenced to undergo punishment therefor by imprisonment in the penitentiary.

It was conceded below and is conceded here that these convictions of themselves well supported the objection of the prisoner in that behalf. In order to remove the objection and to restore the competency of Davis, the people relied upon and exhibited to the court an executive act which they claimed removed the disability arising from these several convictions, and which is as follows :

“Whereas, Charles Davis alias Charles Moore has been convicted of criminal offenses against the laws of the State of California, and whereas it is desirable for the attainment of the ends of justice that he should be restored to citizenship ; now, therefore, I, H. H. Haight, governor of said State, do hereby restore said Davis to all the rights of citizenship possessed by him before his conviction for the offenses above referred to. Witness my hand and the great seal of the State at Sacramento, this 17th day of March, 1871.

“H. H. HAIGHT, *Governor*.

[Seal.]

“Attest : H. L. NICHOLS, *Secretary of State*.”

The court below being of opinion that the competency of Davis as a witness was thereby restored, thereupon overruled the objection of the prisoner in that behalf, and its ruling in this respect is now brought up for review.

The power of the executive of the State to pardon offenses of treason or impeachable offenses is conferred upon him by the constitution. (Art. 5, § 13.) His power in that respect is of the same general nature as that conferred upon the president of the United States by the federal constitution. (Art. 2, § 2.) It is true that the pardoning power of the president extends to the pardon of offenses before as well as after conviction, while that of the governor, under the provisions of the State constitution, embraces only those cases in which a conviction has already been had ; and it is also true that, except in cases arising in the military or naval service, the pardoning power of the president is unrestrained by legislative control, while that of the governor is subject, in its exercise, to such regulations as the legislature may provide in relation to the

manner of applying for pardons ; but the inherent nature and operation of the power itself, whether exercised by the one or the other of these officers, and the consequences of its exercise by either in a given case, must be considered to be substantially identical, and as extending its effect not merely to the punishment otherwise inflicted or to be inflicted, but also to the guilt of the offender. "The effect of a pardon (under the rules of the common law) is to make the offender a new man ; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains a pardon ; it gives him a new credit and capacity ; and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor or felon." (2 Black. 402.) Mr. Chief Justice MARSHALL, speaking of the pardoning power of the president under the provisions of the federal constitution, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon," etc. *United States v. Wilson*, 7 Pet. 159.

In *Ex parte Wells*, 18 How. 310, the supreme court of the United States reaffirmed this view of the nature of the executive power to pardon offenses as existing under the federal constitution, and there can be no doubt that the pardoning power, whether exercised under the federal or State constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times, and that one of the consequences of a pardon extended was and is to remove from the offender that disability to testify as a witness in a court of justice which, by the rule of the common law, was consequent upon his conviction of a felony. The governor might have pardoned Davis had he seen fit—he was not the less the subject of the executive power in that respect because he had already suffered the punishment adjudged for his crime. (2 Wheeler's C. C. 451.) Had he done so, there is no doubt that his competency as a witness would have been thereby restored.

But the executive act under review is not a pardon, nor was it intended to be such. It did not purport to remove the guilt of Davis, nor wipe away the infamy by the law of the land attaching upon him by reason of his conviction. It sought to restore him to all the rights of citizenship possessed by him before his conviction of

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the offenses "above referred to," and to so restore him, while he yet remained a convicted felon, and with the consequent legal infamy attaching by law to that status. The stain of his iniquity, flowing from his conviction, is still left upon him by the executive. The judgment of the law upon that fact is that the credit of his oath is so absolutely and effectually destroyed that he cannot be trusted to testify at all; that it is not to be hoped that he will speak the truth, but must be conclusively assumed that he will not. If the judgment be reversed, the disability is, of course, necessarily removed; if the offense be pardoned the same consequence, too, would follow. But so long as the judgment remains, the guilt it fixes upon the convict is not taken away, and the disability necessarily remains. They are legally inseparable; hence it is held that if the executive pardon the offense, he necessarily removes the disability annexed to it by law, and a proviso inserted in the deed of pardon that the disability shall remain, notwithstanding the pardon of the offense itself, is void. *People v. Pease*, 3 Johns. Cas. 333.

These views dispose of the question presented, but if they did not, it might be not a little difficult to maintain that the attempted restoration of Davis "to all the rights of citizenship" he had theretofore possessed would, by expression, include a right to testify as a witness, or that there is any known relation between the competency of a witness and his "rights of citizenship."

Judgment reversed and cause remanded for a new trial.

POLACK, appellant, v. MANSFIELD.

(44 Cal. 33.)

Ejectment — against agent of United States — Prerogative.

An action of ejectment may be brought against an officer of the army of the United States who is in possession of the demanded premises for the purposes of a military camp or fortification under the direction of the secretary of war or of the president of the United States.

EJECTMENT. The opinion states the facts.

E. L. B. Brooks and *Barnes & Bowie*, for appellant. The court erred in directing a nonsuit. *Osborn v. The Bank of*

the United States, 9 Wheat. 738; *Dreux v. Kennedy*, 12 Rob. La. 502; *Wilcox v. Jackson*, 13 Pet. 498; *Wilcox v. Jackson*, 1 Scam. (Ill.) 366; *Meigs v. McClung's Lessees*, 9 Cr. 11; *Gale v. Bealing*, Pea Patch case, Sen. Doc. vol. 3, 1837-38, No. 140, p. 25.

Pixley & Harrison and *L. D. Latimer*, for respondent. The defendant in ejectment must be he who possesses or occupies in his own right—who holds either as owner or tenant; he must have or claim some interest in the land. The parties or tenants in possession or occupation, only, can be made defendants. Brown on Parties, 246; Adams on Eject. 512; 7 Term R. 327; 1 Chan. 574; 3 Seld. 201; 9 Cal. 268; 21 id. 609; 24 id. 192.

The party or tenant in possession or occupation is he who, by himself, agent or servant, holds or occupies, for a term, to his own use, benefit and enjoyment, and so holds or occupies for that term, as against all the world. 2 Bouv. Law Dic. 258, 351, 573, 579; Burr. Law Dic. tit. h. t.; Webster's Un. Dic. tit. Possession; 4 Barn. & Ald. 653; 8 Barb. 244; 1 Chitty, 118; 2 Barn. & Ald. 371; 11 Abb. Pr. 97; 28 Cal. 534; 36 id. 514; 20 id. 45.

An officer of the United States army, in the temporary command of a military post, does not possess for any term, as against all the world. He may be removed in a moment, in a single flash of the telegraph wire, and without previous warning or appraisal. Neither does he possess for himself. He has not the use nor the enjoyment of the land occupied (in the non-legal sense) by his troops. The use is that of the government, as is, also, the benefit and enjoyment. If it could be said that the commander uses and enjoys for himself, so also may it be said of each and all of his command, from the highest to the lowest. The possession or occupancy of the common soldier, as well as that of each subordinate officer, is not the possession or occupancy of the commander. A writ that would remove the latter and all holding under him could not affect a single member of his command. Their fortunes do not follow his; and though he be removed or superseded, they remain unconcerned. The possession of the defendant is somewhat parallel to, though not so strong, as that of a steward during the temporary absence of his master. The steward, ordinarily, may employ and remove his subordinate, but a military commander can do neither. In this, the possession of the steward seems the greater, and nearer that of the principal. Yet who can doubt that the steward would

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be exempt from suit in ejectment for possession of his master's land? Indeed, upon that question this court has directly passed. *Hawkins v. Reichart*, 28 Cal. 537; *Satterlee v. Bliss*, 36 id. 514; *Mitchell v. Davis*, 20 id. 45. See, also, doctrine of *respondeat superior*.

WALLACE, C. J. This is an action brought to recover the possession of a tract of land in the city and county of San Francisco, called Yerba Buena, or Goat Island. To the complaint, which is in the usual form, and not verified, the defendant pleaded the general issue. He also set up as a defense that the premises sued for are "the soil and freehold of the United States of America, and by the said United States of America owned in fee simple, and possessed through themselves and their agents, and that the said defendant, S. M. Mansfield, is, and during all times in said amended complaint mentioned was, in the possession of the said premises, and holding the same as the duly authorized agent under the authority and laws of the said United States of America, and not otherwise."

In his opening to the jury, at the trial of the action, the counsel for the plaintiff stated that Colonel Mansfield, the defendant, was in the occupation of the demanded premises as an officer of the army of the United States, occupying Goat Island for the purposes of a military camp or fortification, under the direction of the secretary of war and the president of the United States. The court below thereupon directed that a nonsuit be entered against the plaintiff, upon the ground that "Colonel Mansfield simply holds under United States authority." From the judgment of nonsuit thus rendered the plaintiff prosecutes this appeal.

The principal question to be determined concerns the nature of the occupancy of the defendant — whether or not he appears to be an occupant within the sense of the rule authorizing and requiring actions for the recovery of lands to be brought against persons who withhold the possession from the plaintiff.

1. In general the action of ejectment in the courts of this State can be maintained only against the party in possession of the premises; that is, against the person who withholds the possession from the plaintiffs. Such a person may not indeed, be in the actual personal occupancy — he may not reside thereon, and may not have even personally entered thereon, and yet he may be in possession through the agency of mere servants and employees acting under his

direction and control; and as such person in possession he may be properly made a defendant in an action to recover the possession.

2. In general, too, a mere servant or employee, claiming for himself no interest in the premises, nor any right to their possession, but acting under the control of another, and only in that manner occupying and being personally upon the premises, cannot be sued in an action of ejectment brought to recover them, for such facts and circumstances only go to show that the employer, and not the servant or employee, is the party in possession, and, of course, answerable in that action. "It will be readily seen that a mere servant or employee may, in one sense, have the occupation of the premises of which he has no control, and in which he claims no right; but his occupation is the occupation of his employer, within the meaning of that term, as employed when treating of the action of ejectment." *Hawkins v. Reichart*, 28 Cal. 534.

3. But the rule which thus exempts the mere servant or employee of another from an action, presupposes that the employer may be sued, and that the wrongs of which the plaintiff complains may be redressed by resort to an action against the employer, as being the real party committing the ouster. In a case, therefore, where the employer is for any reason not amenable to an action, the rule referred to has no application, and the employer or servant becomes *ex necessitate*, the proper party defendant, since he is the only party who can be subjected to suit at all. Were this otherwise, it would result that open and admitted violation of private rights would find no redress in the courts of the country. The government of the United States, as such, cannot be sued as a party defendant in the courts of the State; and unless its servants and employees may be properly held responsible for the lawless invasion of private property committed by them under the direction or command of the government, the citizen is left wholly without the protection which it is the first aim and purpose of the municipal law to afford. In *Meigs et al. v. McClung's Lessees*, 9 Cranch, 11, which was an action of ejectment, the defendants in error had, by the judgment of the court below, recovered the premises from Meigs and others, who occupied them as officers and under the authority of the United States, who had soldiers there in garrison, and had expended some \$30,000 in the erection of military works. The judgment was affirmed by the supreme court of the United States, the court, per MARSHALL, J., saying: "The land is certainly the prop-

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erty of the plaintiff below, and the United States cannot have intended to deprive him of it by violence and without compensation." In *Jackson ex dem. McConnell v. Wilcox*, 1 Scam. 344, which was an action of ejectment for the recovery of premises upon which Fort Dearborn was situated, it appeared that the defendant, as an officer of the army, with soldiers under his command, occupied the premises sought to be recovered as a military post; and to an objection made that the action could not be maintained against a military officer of the federal government occupying in that character, the supreme court of Illinois said: "The defense is not tolerated for a moment; such an act was clearly military usurpation and illegal, and indefensible in every point of view in which it could be placed. This objection, then, is necessarily altogether untenable. We are not prepared yet to admit the maxim *inter arma leges silent*."

The judgment which the plaintiff in that case had recovered was subsequently reversed upon error by the supreme court of the United States; but though upon the record and in the opinion delivered in the supreme court, it appeared that the premises were embraced in "the military post called Fort Dearborn, of which post; at the time of bringing the suit, Wilcox was in possession as the commanding officer of the United States," the controversy was not disposed of upon that ground, but judgment passed in favor of the defendant Wilcox, only upon the ground that the title of the United States, as made to appear in that action, was superior to the title relied upon by McConnell, the lessor of the plaintiff Jackson. Indeed, it will be found that in delivering the opinion of the court in that case, Mr. Justice BARBOUR, in adverting to the nature and circumstances of the controversy, uses this language: "Wilcox, the defendant in the original suit, did not claim or pretend to set up any right or title in himself. He held possession as an officer of the United States, and for them and under their orders. This being the state of the case, the question which we are now examining is really this: whether a person holding a register's certificate, without a patent, can recover the land as against the United States." * * * "This, then, being the case, and this suit having been in effect against the United States, to hold that the party could recover as against them, would be to hold that a party having an inchoate and imperfect title could recover against the one in whom resided the perfect title," etc. In the

opinion delivered in that case, though frequent allusion is made to the character in which the defendant occupied the premises, there is found no intimation that the nature of his occupation, or the character of his possession, afforded him any immunity against the action which McConnell brought, or precluded an adjudication of the merits of the title upon which he relied for recovery. See, also, *Dreux v. Kennedy*, 12 Rob. (La.) 502, in which the question is considered at length and with great ability and research; and *Osborn v. The Bank of the United States*, 9 Wheat. 738, in which the same principle is applied by MARSHALL, C. J., upon a bill brought by the bank against Osborn, as auditor of the State of Ohio, in the circuit court of the United States, where the State itself could not be made a party defendant.

The principal case relied upon in opposition to these views, in fact, the only one brought to our attention in which it is held that an action against an army officer in occupancy of premises cannot be maintained, is that of *People v. Ambrecht*, 11 Abb. Pr. 97. That was an action of ejectment brought by the State of New York against Ambrecht (who was an ordnance sergeant of the army of the United States), for the recovery of a strip of land lying adjacent to Fort Ontario. In the opinion in that case, the general rule already adverted to, that a mere servant of another has no such possession as will subject him to the action, is applied, and the qualification of the rule itself seems not to have been noticed. It is there held, too, that as the United States cannot be directly sued, so they cannot be indirectly sued in the persons of their agents or officers, by the owner of the estate, for its recovery, the converse of which had already been established, as we think, by the cases of *Meigs v. McClung's Lessee* and *Wilcox v. Jackson*, *supra*, to which may be added the recent case of *Grisar v. McDowell*, 6 Wall. 363, when the defendant McDowell was in the occupation as an officer of the army of the United States, commanding the military department of California, and, as such officer, entered upon the possession of the premises previous to the commencement of this action, and has ever since held them under the order of the secretary of war, as part of the public property of the United States, reserved for military purposes, "and in which judgment in favor of the defendant was rendered only upon the merits of the case and upon the ascertained superiority of the title of the United States (under the reservation made by President

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Fillmore and the decree of the circuit court of May, 1865) over that of the city of San Francisco, under whom the plaintiff claimed to recover in the action.

Judgment reversed and cause remanded for a new trial.

KIMBALL V. THE UNION WATER COMPANY.

(44 Cal. 172.)

Mandamus — will not lie to compel transfer of stock.

One entitled to stock in a private corporation has a right of action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company's books, and therefore mandamus will not lie to compel the transfer.

MANDAMUS. The opinion states the case.

James H. Hardy, for relators.

Elisha Cook and *H. F. Crane*, for respondents.

NILES, J. This is an original application in this court for a mandamus to compel the respondent Scribner as president, and the respondent Rhodes as secretary of the Union Water Company, a corporation, to transfer to the relators on the books of the company certain shares of stock.

The petition avers that on the 6th day of April, 1870, one Regan was the owner of fourteen shares of the stock of the company, and the holder of a certificate transferable in the usual manner by indorsement and surrender; that on the 7th of April, 1870, Regan, by one Senter, his attorney in fact, indorsed and delivered the certificate to the relators, who presented the same at the office of the company and demanded a transfer of the stock to themselves upon the books of the company; that the application was denied upon the ground that Regan was a non-resident of this State, and a bond of indemnity was demanded; that on the 26th of September, 1870, the demand was renewed, accompanied by a tender of a sufficient

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bond of indemnity, and was again denied; that on the 27th of September the certificate was again presented, accompanied by a bond of indemnity approved by the judge of the district court of that district, and a transfer of the stock demanded, and again refused.

To this petition the respondents demur, upon this ground, among others: that it appears from the petition that the relators have a plain, speedy, and adequate remedy in the ordinary course of law. If this appears upon the face of the petition, it is a fatal objection to its sufficiency. By section 467 of the Practice act, it is provided that the writ of mandamus shall issue "to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use or enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, officer, board or person."

Section four hundred and sixty-eight provides that "this writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law."

It is clear to us that the latter section should be construed as a limitation of the powers of the court as conferred by section four hundred and sixty-seven, and not as an enlargement of these powers.

We must presume that the legislature, in establishing this statutory remedy, had in view the nature and extent of the remedy as known at the common law, and as used in the other States of the Union. The adoption of the language so frequently used by the courts and law writers in defining the limits and conditions of the writ—that "it shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law"—makes it evident that the same limits and conditions were intended by the statute. It may issue in the cases mentioned in section four hundred and sixty-seven, but only when it is evident that the law has provided no other sufficient remedy.

Conceding that upon the presentation of the certificate of stock, indorsed as stated in the petition, with the proffer of a sufficient bond of indemnity, it was the absolute duty of the respondents to transfer the fourteen shares of stock upon the books of the company to the relators, the question is presented whether the law affords any adequate remedy other than mandamus to the parties aggrieved.

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It has been so frequently decided that a party entitled to stock in a private corporation has an action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company's books, that it must be considered as a settled principle of law. *King v. Bank of England*, 2 Doug. 526; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Ex parte Fireman's Insurance Company*, 6 Hill, 243; *American Asylum, etc., v. Phoenix Bank*, 4 Conn. 172; *Sargent v. Franklin Insurance Company*, 8 Pick. 90.

The relators do not deny the existence of the remedy, but claim that it is inadequate, in that it does not afford the specific redress which they seek.

In *Shipley v. The Mechanics' Bank*, *supra*, an application was made for a mandamus to compel a corporation to transfer to the petitioners certain shares of stock owned by them. The court say: "The applicants have an adequate remedy by a special action on the case, to recover the value of the stock, if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by mandamus in so ordinary a case. It might as well be required in every case in which trover would lie."

In *Ex parte Fireman's Insurance Company*, 6 Hill, 243; Mr. Justice BROWN, in rendering the opinion of the court, said: "When a corporation improperly refuses to transfer stock, the party injured has an ample, though not a specific, remedy by action; and for that reason mandamus will not lie. As a general rule mandamus will not be awarded where the party has an adequate remedy by action." The same doctrine is announced in the other cases we have cited, and has generally met the approval of the American courts. We think it stands upon too high authority to be disturbed.

There is nothing in the petition tending to show that the particular stock in question possessed any specific value over other stock of the corporation. The affidavit of Mr. Hardy filed with the petition avers that an acquisition of the fourteen shares claimed is necessary to enable the relators to vote them at an election of officers to be held in January, 1872, and to defeat a combination of the present officers said to be detrimental to the interests of the corporation.

We do not think that this affidavit was intended to present any issuable facts as a part of the petition, but merely to show cause

for a relaxation of the rules of the court, and to obtain a hearing at an earlier day than those rules permitted. When this object was accomplished the affidavit was *functus officio*, and we cannot consider its averments as forming a part of the case made by the petitioner.

Mandamus denied.

BAXTER V. ROBERTS, appellant.

(44 Cal. 187.)

Master and servant — duty of master to notify servant of risks.

Defendant claimed title to land occupied by other persons, and who threatened to resist by force any interference with their possession. Defendant knowing this, but, without communicating it to plaintiff, employed plaintiff to go with him to the land to do some work, in doing which plaintiff was shot by the persons in possession. *Held*, that he might recover against defendant for the damage so suffered by him.

If the master has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the servant to be, he is bound to inform the servant of the fact, and if he fails to do so, he is liable to the servant for such damages as he sustains by reason of such causes.

ACTION for damages. The plaintiff recovered judgment for the sum of two thousand dollars, and the defendant appealed. The other facts are stated in the opinion.

McAllister & Bergin, for appellant. Roberts should not be made liable for the unjustifiable, illegal and criminal shooting of plaintiff by third parties, with whom he had no connection.

The cases wherein the master has been held liable for knowingly or carelessly exposing his servant to a positive danger, of which the servant had no warning or notice, are plainly distinguishable from this case. *Noyes v. Smith*, 28 Vt 59.

Of this case the district judge, in refusing the motion for nonsuit, said: "It was the most satisfactory case in favor of plaintiff that he could find." *Cayzer v. Taylor*, 10 Gray, 274; *Holmes v.*

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Clarke, 6 Hurl. & Norm. 348; *Ryan v. Fowler*, 24 N. Y. 410; *Buzzel v. Laconia Manufacturing Co.*, 48 Me. 113; *Riley v. Baxendale*, 6 Hurl. & Norm. 445; *Warner v. Erie Railway*, 39 N. Y. 468; *Loonan v. Brockway*, 3 Rob. 74; *Clarke v. Holmes*, 7 Hurl. & Norm. 937; *Roberts v. Smith*, 2 id. 213; *Keegan v. Western Railroad Corporation*, 8 N. Y. 175; Addison on Torts, 180.

The sum of all the authorities is, that the master must in all cases indemnify his servant for losses or injuries caused by his (the master's) want of ordinary care. New York Civil Code, art. 1007; *Ormond v. Holland*, 96 Eng. Com. Law, 102.

The employment must be the cause, and not merely the occasion, of the loss or damage, to entitle the employee to reimbursement from the employer. Story on Agency, § 341; Story on Contracts, § 176; *Moore v. Appleton*, 26 Ala. 637, 638.

The defendant, Roberts, had a right to presume that any squatters who had possession or control of the premises he proposed to enter upon would act legally. The case would have been different had he exposed his employee to violence from an insane person or a ferocious animal. Matthews' Presumptive Evidence, 26, 27, 28, 29; Addison on Torts, 184, 185.

Quint & Hardy, for respondent. The general principle that any fraudulent conduct of another, which occasions injury to the plaintiff, is actionable, without regard to the novelty of the case, is well settled. *Pasley v. Freeman*, 2 Smith's L. C. 152; *Yates v. Joice*, 11 Johns. R. 136; *Sheldon v. Sheldon*, 13 id. 220; *Wardell v. Fosdick & Davis*, id. 325; *Monell v. Colden*, id. 399; *Adams v. Paige*, 7 Pick. 542; *Chisolm v. Gadsden*, 1 Strobbart, 222; Bishop's Crim. Law, vol. 1, §§. 17, 18, 19, 1098.

It is one of the fundamental principles of the law that damages resulting from fraud, deceit, or malice, always furnish a good cause of action.

It is the duty of the master to use proper care and not expose his servant to extraordinary risks which the servant could not reasonably anticipate. Shearman & Redfield on Negligence, § 93; *Davis v. England*, 10 Jur. (N. S.) 1235; *Vose v. Lancashire and Y. R. Co.*, 2 Hurlst. & N. 728; *Haynes v. East Tenn. R. Co.*, 3 Cald. 222.

Again, the master is bound to use ordinary care and diligence to

provide sound and safe materials and accommodations for his servants. Shearman & Redfield on Negligence, § 92; *Buzzel v. Laconia Mfg. Co.*, 4 Me. 113; *Braydon v. Stuart*, Macq. H. L. 30; *Chicago R. Co. v. Sweet*, 45 Ill. 197; *Ryan v. Foulner*, 24 N. Y. 410; *Reegan v. Western R. R. Co.*, 8 id. 175; *Noyes v. Smith*, 28 Vt. 59; *McGartrick v. Wason*, 4 Ohio St. 566; *Ogden v. Rummen*, 3 Fost. & F. 750; *Webb v. Bennie*, 4 id. 608.

WALLACE, C. J. This action was brought by Baxter, who is a carpenter by occupation, to recover damages from the defendant for certain injuries sustained by the former by reason of a gunshot wound received by him at the hands of some third and unknown party or parties. Roberts was the owner of a certain lot in San Francisco, covered by water, and lying upon the southerly side of Seventh street, and which had been inclosed by him with a fence, and he employed the plaintiff to go with him upon these premises and perform labor there as a carpenter. Upon reaching the lot in a boat, the plaintiff and another employee, in company with the defendant, commenced to tear away some boards from a fence newly erected thereon, and which ran across the northerly corner of the lot to Seventh street, when the party were fired upon from a house or shanty situate upon a neighboring lot to the west of the Roberts lots, and the plaintiff was shot through the joint of the left shoulder with a rifle ball, which carried away portions of the bone, causing him great physical suffering, of course, and, in the opinion of his medical attendant, maiming him for life.

The evidence upon the part of the plaintiff tended to show, and the verdict of the jury upon the issues joined must be considered to have found the fact to be, that when the defendant engaged the services of the plaintiff to work upon these premises, and took him there in the boat for the purpose of performing the labor, the defendant knew or had information such as would reasonably lead him to believe that his interference with the newly-erected fence would be forcibly resisted by certain other parties who had erected it and claimed to be in its possession, and who actually occupied the shanty already referred to, with loaded fire-arms, within shooting range of this fence, and who had announced to the defendant their purpose to resist by force any interference therewith. The verdict must be considered, too, to have found that such knowledge, belief,

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or information as the defendant possessed upon these matters was not communicated to, but was withheld by him from, the plaintiff, who went to the performance of the work in ignorance and without the apprehension or suspicion that, in going, he was thereby incurring any personal danger or hazard.

The learned judge of the court below stated to the jury that the "turning point in the case is the charge that the defendant Roberts employed the plaintiff Baxter to perform a service which he, Roberts, knew to be perilous, without giving Baxter any notice of its perilous character," and instructed them as follows:

"If Roberts knew, or if he had good reason to believe, that rigid or forcible resistance would be offered to him and his party by parties whom he knew or believed to be there, on that ground or in the vicinity near by, it was his duty to inform Baxter of the nature of the employment; to disclose to him that knowledge so that Baxter might act understandingly, and take the chances if he chose to do so. If Roberts had such knowledge and concealed it from the plaintiff, then he is liable.

"If you find the persons shooting had any adverse possession or occupation, whether complete or otherwise, at the time of the shooting, and the defendant knew the fact, and if you further find that the defendant had knowledge that such possession would be maintained by force if interfered with by him by the taking of the 'new fence,' so-called, and concealed such knowledge and information from the plaintiff, and failed to inform him of the danger of the employment, he must be held liable in damages, and you should find a verdict for the plaintiff."

That one contracting to perform labor or render service thereby takes upon himself such risks, and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact, or put him in possession of such information; these general principles of law are elementary and firmly established. They are usually applied to cases in which the employee has sustained injury by reason of some defect or unsoundness in the machinery or materials unknown to him about which he is employed to perform labor, and of which the employer knew or

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might have known in the exercise of ordinary care and vigilance on his part. The general principle which forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer, and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for the employee is entitled, in all cases, to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if, at the proffered compensation, he be willing to assume the risk and incur the hazard of the business; and if the employer have such information or knowledge and withhold it from the employee, and the latter afterward be injured in consequence thereof, the employer is liable to him in damages therefor.

Judgment affirmed.

NOTE.—A master is bound to take all reasonable precaution to secure the safety of his workmen. *Brydon v. Stewart*, 2 Macq. H. L. Cas. 30; *Paterson v. Wallace*, 1 id. 748; *Weems v. Mathieson*, 4 id. 215; *Hallower v. Henley*, 6 Cal. 209; *Chicago & Northwestern Ry. Co. v. Jackson*, 55 Ill. 492; S. C., 8 Am. Rep. 661; *Gibson v. Pacific R.R. Co.*, 46 Me. 163.

In ordinary cases, where a workman is employed to do a dangerous job, he will be held to have assumed all the risks pertaining to the business; but where there is no danger in the work itself, and the peril grows out of extrinsic circumstances, or causes which cannot be discovered by the use of ordinary precaution and prudence, the employer is bound to disclose the danger if known to him, and if he fails to make this disclosure, and the workman is injured, the master is liable. *Perry v. Marsh*, 25 Ala. 659.

"An employer," said Judge HOAR in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; S. C., 8 Am. Rep. 506, "is under an implied contract with those whom he employs to adopt and maintain suitable instruments and means with which to carry on the business; and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment;" and *Cayzer v. Taylor*, 10 Gray, 274; *Seaver v. Boston & Maine R. R. Co.*, 14 id. 466; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; and *Gilman v. Eastern R. R. Co.*, 19 id. 233 and 13 id. 483, were cited as authorities to the proposition. See also *Shearman & Redfield on Negligence*, 3d ed., §92; *Wharton on Negligence*, 208; *Hilliard on Torts*, 4th ed., 458. And not only is the employer bound to notify the servant of all extrinsic dangers known to him, but also of those which it was his duty to have searched out and remedied. *Clark v. Holmes*, 7 H. & N. 937. — REP.

OERF V. HOME INSURANCE COMPANY.

(44 Cal. 320.)

Insurance — construction of policy — “ Dwelling.” Use of kerosene oil for lights

Where a policy of fire insurance upon goods in a store contained a clause prohibiting the use of any burning fluid or chemical oils, and a subsequent clause expressly permitting the use of kerosene oils for lights in dwellings: *Held*, that the use of kerosene oil as a light in the store rendered the policy null and void.

Where the owner of a store in which the insured goods were slept in a small back room at the store, with his clerk, but kept a kerosene lamp burning at night in the store, for protection against burglars: *Held*, that such use did not constitute the premises a dwelling, so as to avoid a clause in the policy which prohibited the use of kerosene light in the store.

ACTION on a policy of insurance.

The defendant by two several policies insured one Stoutenberg against loss by fire of certain goods and fixtures in a store in the city of Sacramento. The store was destroyed by fire on the 31st day of December, 1869, and thereafter Stoutenberg, for a valuable consideration, assigned his interest in the policy to the plaintiff, who brought this action to recover the amount of the insurance. It appeared on the trial that Stoutenberg and his clerk, until about three weeks before the fire, slept at the store, in a back room joining the store, and the clerk slept there until the fire. The store was lighted with gas in the evening, and at night the gas was turned off and a small lamp filled with kerosene oil was, during each night, left burning on the counter in the store, as a protection against burglars. The plaintiff had judgment; the court granted the defendant a new trial, and the plaintiff appealed from the order granting the new trial.

The other facts are stated in the opinion.

Coffroth & Spaulding, S. M. Wilson, and McKune & Welty, for appellant, cited *Knight v. N. E. M. Ins. Co.*, 8 Cush. 393; *Stebbins v. Globe Ins. Co.*, 2 Hill, 589, 632; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Snyder v. Farmers' Ins. Co.*, 13 Wend. 92; 16 id. 481; *K. & L. M. Ins. Co. v. Southard*, 8 B. Monr. 634; *Wall v. Howard Ins. Co.*, 14 Barb. 383; *Columbia Ins. Co. v. Cooper*,

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50 Penn. 331; *Glendale W. Co. v. P. I. Co.*, 21 Conn. 19; *P. Ins. Co. v. Horner*, 2 Ohio, 452; *L. I. Ins. Co. v. Mitchell*, 48 Penn. 367; *Lee v. Boston*, 2 Gray, 490; *Abington v. N. Bridgeport*, 23 Pick. 187; *Putnam v. Johnson*, 10 Mass. 501.

Doyle & Barber and H. P. Barber, for respondent, cited *Murdock v. Chenango Co.*, 2 Conn. 210; *Mead v. N. W. Ins. Co.*, 7 N. Y. 530; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; *Inman v. Western Fire Ins. Co.*, 12 id. 452; *Egan v. Mutual Ins. Co.*, 5 Denio, 326; *Stettiner v. Granite Ins. Co.*, 5 Duer, 594; *Westfall v. Hudson R. Ins. Co.*, 12 N. Y. 289.

WALLACE, C. J. The appeal is from an order granting the defendant a new trial. The action was upon a policy of insurance which contained a provision that "if the accused shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in their policy, then, and in every such case, this policy shall be void. Kerosene oil, however, may be used for lights in dwellings and kept for sale in stores in quantities not exceeding five barrels, to be drawn by daylight only." At the request of the defendant the court instructed the jury as follows :

"If the jury believe from the evidence that a lamp supplied by kerosene or chemical oil was used as a light in the store in question at the time of the fire, or at any time after the execution of the policy of insurance, before the fire, that fact renders the policy null and void, and the verdict must be for the defendant."

The motion for a new trial was made upon the ground "that the verdict should have been for defendant instead of plaintiff in consequence of the assured using kerosene oil as a light in said store as aforesaid without written permission of his policy."

1. We are of opinion that the purport of the policy is that the use of kerosene oil was thereby prohibited to the assured unless used as a light in a *dwelling*. If the premises were not of that character, but were a *store*, then its use by the assured amounted to a forfeiture of the policy. The privilege of using kerosene oil as a light is expressly extended to the case of a *dwelling*, and in the face of this it would be doing violence to the plain intention of the parties, as

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shown in the language of the policy, to extend that privilege so as to embrace the case of a store as such.

2. Nor do we think that it can be fairly claimed that the premises upon which the kerosene oil was actually used as a light constituted the *dwelling* of the assured within the intent of the policy. Even supposing that the small back room in which the assured and his clerk slept was in itself a *dwelling*, distinguishable from the larger room which unquestionably was a store, and that the use of kerosene oil within the small sleeping apartment as a light would therefore be its use in a dwelling, and so be permissible under the terms of the policy; yet it is apparent from the testimony given in the case by the assured and his clerk when testifying as witnesses, that the lamp supplied with kerosene oil was, habitually and on the night of the fire, left burning on the counter in the store room proper, where it seems to have been placed for protection against burglars. We think that the instruction as given by the court was correct, and there being no conflict in the evidence as to the fact that the kerosene lamp was used as a light in the store proper, the verdict of the jury ought to have been for the defendant.

Order affirmed.

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44 Cal. 475.)

Contempt of court— inability to pay alimony.

A husband, who lived separate from his wife, and had been adjudged by a court of equity to pay her a certain sum monthly for her support and that of her infant child, *held*, not guilty of contempt for not paying the sum if he was unable to pay it and had not voluntarily created the disability for the purpose of avoiding the payment.

THE facts are stated in the opinion.

Delos Lake, for appellant.

Howe & Rosenbaum, for respondent.

BELCHER, J. The plaintiff, in January, 1868, obtained a judgment against the defendant, who was the husband of the plaintiff, but living apart from her, requiring him on the first day of each month to pay to her, for the support of herself and infant child, the sum of eighty dollars. This judgment, on appeal to this court, was affirmed. *Galland v. Galland*, 38 Cal. 265. The payments being in arrears since September, 1869, the plaintiff presented an application to the district court, setting forth the failure and refusal of the defendant to pay, and praying that he might be attached and required to answer as for a contempt. Upon being brought into court, the defendant, by his affidavit, answered that he had applied all his earnings, except what was required for his own personal use and that of an invalid daughter, toward the payment of the alimony adjudged to be paid; that he had no money or property except his personal clothing and a few articles of trifling value for his own personal use, the whole value of which was not more than seventy-five dollars, and that he was unable to make the payments required by the judgment.

After consideration the court refused to adjudge the defendant guilty of a contempt, on the ground that he was unable to comply with the judgment, and thereupon dismissed the application. The appeal is from the order of the court refusing to commit the defendant.

It is claimed by the appellant that the process sought is in the nature of an execution to enforce the performance of a duty by the defendant, and that she is entitled to it without inquiry as to whether he is able to perform or not; that his ability to perform is a question which can be inquired into only upon proceedings afterward taken for his release.

From the earliest times courts of equity have used the process of contempt for the purpose of compelling a party to pay money or to perform some pecuniary obligation, which he may have been directed to pay or perform by the decree or order of the court, as well as to enforce obedience to a decree, directing the performance of some other act, such as the execution of deeds or the delivering up of documents.

In this State the power of courts to punish for contempt has been regulated by statute. It is provided that when one is adjudged guilty of contempt he may be punished by a fine of not exceeding five hundred dollars and by imprisonment for not exceeding five days,

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except when the contempt consists in the omission to perform an act which is yet in his power to perform, in which case he may be imprisoned until he have performed it. Practice act, §§ 488, 489. This is a limitation upon the power formerly exercised by courts to punish for contempt; but whether courts in this State can exercise power in this respect in cases not named in the statute or otherwise than it has provided, we are not called upon in this case to consider. In our opinion, however, where one is called before a court to answer for contempt for not doing an act which he has been adjudged to do, inquiry may properly be held as to whether it is still in his power to do it, and if it be not he should not be adjudged guilty, unless he has voluntarily and contumaciously disabled himself from doing it. *Ex parte Cohen*, 6 Cal. 318.

In *Myers v. Trimble*, 3 E. D. Smith, 612, it is said: "If it appear that the debtor is unable to pay the sum ordered to be paid, that may be deemed a sufficient excuse when he appears to answer for apparent contumacy. Courts will not adjudge a defendant in contempt for not doing an impossibility, nor for not doing what it is not in his power to do, unless he has voluntarily disabled himself to do the act, when the creation of the disability was itself a contumacious act."

In this case it is not claimed that the defendant was either able to pay the money, or that he had contumaciously rendered himself unable to pay it.

Order affirmed.

RUSSELL v. KELLY, appellant.

(44 Cal. 641.)

Libel — Evidence — application of the libel — subsequent publication.

In an action for a libel in which the name of the plaintiff is not mentioned, the plaintiff may, for the purpose of proving that the libel referred to him, introduce witnesses to testify that they knew the parties and were familiar with the relations existing between them immediately prior to and at the time of the publication, and that on reading the publication they understood the plaintiff to be the person referred to.

In an action for a libel in which the name of the plaintiff is not mentioned, a subsequent publication by the defendant, in which the plaintiff's name is mentioned, may be introduced in evidence to show that the former publication referred to the plaintiff.

Russell v. Kelly.

ACTION for libel. The plaintiff had been employed by the defendant as a salesman and book-keeper in his boot and shoe store, and he discharged him, and thereafter published in the San Francisco *Chronicle* the following articles, which constituted the libels declared on:

“P. Kelly, prize bootmaker, desires to inform his customers and the public in general that, owing to the great increase of his business, he has made a change in the ladies’ custom department by discharging those who were incompetent and employing three of the most experienced artists from New York.”

“*To business men: Advice from P. Kelly*—When you have incompetent men in your employ discharge them at once, as P. Kelly does, and get better ones in their stead.

“P. KELLY,
“*Prize bootmaker of the Pacific coast.*”

The plaintiff recovered judgment, and the defendant appealed. The other facts are stated in the opinion.

Porter, Holladay & Weeks, for appellant. The language in this case is not ambiguous, and therefore it was error to allow the witnesses to construe it before the jury. “Where the language is unambiguous it is to be construed in its ordinary sense, and without reference to how those to whom it was published understood it, or what was intended by the publisher.” Towns. on Slander, § 140. Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals, better informed on the matter alluded to, might form a different judgment. *Hawkinson v. Bilby*, 16 M. & W. 442. The judgment of the witness is not to be substituted for the judgment of the jury. Heard on Libel, § 269. No writing whatever is to be esteemed a libel unless it reflects upon some particular person. Hawk. P. C., chap. 73, § 9. Where the language does not concern the particular person, no averment or innuendo can make it so. *Solomon v. Lawson*, 8 Q. B. 823; *Ingram v. Lawson*, 6 Bing. (N. C.) 212; 8 Scott, 571; *Dottarier v. Bulsby*, 4 Har. 208; *Small v. Tappan*, 5 Cush. 104.

James B. Townsend, for respondent.

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CROCKETT, J. The action is for libel, founded on certain publications made by the defendant, in which the name of the plaintiff was not mentioned. At the trial witnesses were called by the plaintiff to testify that they were acquainted with the parties and familiar with the relations existing between them, immediately prior to and at the time the publications were made, and that on reading the publications they understood the plaintiff to be one of the persons referred to. The plaintiff also offered in evidence a subsequent publication made by the defendant (in which the plaintiff was referred to by name) for the purpose of identifying him as one of the persons to whom the preceding publications referred. All this evidence was admitted by the court against the objections of the defendant, and this ruling is relied upon as error.

There is some contrariety in the authorities on the question, whether, in any case, it is competent to prove, when the name of the plaintiff is not mentioned in the alleged libel, that the witnesses on reading it understood it as applying to the plaintiff. The following authorities hold that such evidence is not admissible: *Van Vetcher v. Hopkins*, 5 Johns. 211; *Gibson v. Williams*, 4 Wend. 320; *White v. Sayward*, 33 Me. 322; *Snell v. Snow*, 13 Metc. 278; *Rangler v. Hummel*, 37 Penn. St. 130; *Briggs v. Byrd*, 11 Ind. 353. A contrary rule was adopted in the following cases: *Smart v. Blanchard*, 42 N. H. 137; *Mix v. Woodward*, 12 Conn. 262; *Smawley v. Stark*, 9 Ind. 386; *Goodrich v. Davis*, 11 Metc. 484; *Miller v. Butler*, 6 Cush. 71; *Leonard v. Allen*, 11 id. 271; *McLaughlin v. Russell*, 17 Ohio, 475; *Tompkins v. Wisener*, 1 Snead, 558; *Morgan v. Livingston*, 2 Rich. 573; *Commonwealth v. Buckingham*, Thachers' Crim. Cas. 29.

The rule as laid down in 2 Starkie on Slander, p. 51, is that the application of the slanderous words to the plaintiff, and the extrinsic matters alleged in the declaration, may be shown "by the testimony of witnesses who knew the parties and circumstances, and who can state their judgment and opinion on the application and meaning of the terms used by the defendant." At page 321 it is said that where it is ambiguous on the face of the libel to whom it was intended to be applied, "the judgment and opinion of witnesses who, from their knowledge of the parties and circumstances, are able to form a conclusion as to the defendant's intention and application of the libel, is evidence for the information of the jury." The same rule is stated in almost the same language in 2

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Greenl. Ev. § 417. The correctness of this rule is not only established by the weight of authority, but is supported by every consideration of justice and sound policy. I am, therefore, of opinion that there was no error in admitting oral testimony to show the application of the alleged libel to the plaintiff.

It is equally clear that the subsequent publication was admissible for the same purpose, and this was the only purpose for which it was offered or admitted. This point was expressly decided in *Chubb v. Westly*, 6 Car. & P. 436, and *White v. Sayward*, 33 Me. 323. The appeal is without merit.

Judgment affirmed.

CALLAHAN v. DONNOLLY, appellant.

(45 Cal. 152.)

Restraint of trade. Contract not limited as to territory void.

Defendant agreed with plaintiff not to engage for eight years in the manufacture of a certain yeast powder, nor in any branch of the yeast powder business. *Held*, void, as an undue restraint of trade. (*See note, p. 173.*)

ACTION for breach of contract.

On the 13th of September, 1864, Thomas Donnolly, T. C. Donnolly, and one Landsberger, comprising the firm of Donnolly & Co., sold to the plaintiff for \$17,085 the business of manufacturing "Donnolly's Yeast Powder," and entered into his employment, agreeing that for eight years they would not engage in the manufacture of "Donnolly's Yeast Powder," nor in any branch of the business. They were to receive for their services a certain percentage of the profits of the business. On the 8th of April, 1867, T. C. Donnolly sold his interest in the contract to the plaintiff for \$4,574, again covenanting that he would not make or sell any powder "under the name or in the nature of the Donnolly yeast powder," within the State of California. This action was brought upon an alleged breach of these contracts. It is brought to enjoin the defendant from manufacturing or selling such yeast powder, and to recover damages. The answer denies making or selling Donnolly's yeast powders; but admits making another kind of yeast

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powder. After hearing evidence the court made an order enjoining the defendant from manufacturing or selling any yeast powder "in the nature of the Donnolly yeast powder," during the pendency of the action. The defendant appealed from the order.

Mr. Mastick, for appellant, argued that the contract not to make or sell the yeast powder is void, as being in total and general restraint of trade and public policy. *Wright v. Ryder*, 36 Cal. 342; *More v. Bonnet*, 40 id. 251; 21 Wend. 157; 19 Pick. 51; 1 Smith's Lead. Cas. 508.

Barnes & Bowie, for respondent.

By the COURT. The contract which provides that the Donnollys will not engage in the manufacture of "Donnolly's Yeast Powders" nor in any branch of the yeast powder business, is in the latter clause plainly in restraint of trade, and therefore void. *Wright v. Ryder*, 36 Cal. 357; *More v. Bonnet*, 40 id. 251; S. C., 6 Am. Rep. 621.

It does not appear that the Donnollys are manufacturing "Donnolly's Yeast Powders." A contract in restraint of trade, and which is not by its terms limited as to the territory embraced in its operation, is not to be supported. "It is to be remembered, however (said TINDAL, C. J., in *Horner v. Graves*, 7 Bing. 744), that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law."

A contract in restraint of trade must designate the space within which it is to operate, and must not be unreasonably extended. Such contracts, when upheld, are only in cases where the parties have restricted the territory in which they are to operate, and where the court, in considering the nature of the business in connection with the territorial limits assigned, is of opinion that the designated limits are not unreasonable in extent.

Here, no limits being given by the contracting parties, the case falls within the general rule that prohibits contracts in restraint of trade.

Order reversed.

NOTE.—That contracts between persons restraining one from setting up or exercising a particular trade within a certain limited district, and for a valuable consideration, are valid, has been held in a great number of cases, notwithstanding the fact that the law does not favor such contracts. See cases collected in note to *Mitchel v. Reynolds*, 1 Smith's Lead. Cas. 712; 2 Parsons on Cont. 748, note z, 6th ed.

It is generally stated that the inquiries to be made to determine the validity of a contract in restraint of a trade or profession are: 1st. Whether the restraint is partial;

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2d. Whether it is upon an adequate consideration; and 3d, whether it is reasonable. *Holbrook v. Waters*, 9 How. Pr. 335; *Dunlop v. Gregory*, 10 N. Y. 241; *Chappel v. Brockway*, 21 Wend. 157; *Lang v. Werk*, 2 Ohio St. 520; *Thomas v. Miles*, 8 Id. 275; *Holmes v. Martin*, 10 Ga. 503.

Such contracts, to be valid, must be limited as to place or extent of operation, and contracts imposing general restraint have usually been held to be void. *Ward v. Byrne*, 5 M. & W. 548; *Homer v. Ashford*, 3 Bing. 828.

The main consideration, however, of the later cases is, we apprehend the reasonableness of the restraint; and a party is entitled to so large a restraint as may be necessary for his protection, and no larger. *Mallan v. May*, 11 M. & W. 853; *Kellogg v. Larkin*, 3 Chand. 133.

ALDERSON, B., thus stated the proposition in *Pilkington v. Scott*, 15 M. & W. 657: "If it be an unreasonable restraint of trade it is void altogether; but, if not, it is lawful; the only question being whether there is a consideration to support it, and the adequacy of the consideration the court will not inquire into, but will leave the parties to make the bargain for themselves." In *Tallis v. Tallis*, 1 E. & B. 291, it was held that a covenant in restraint of trade was valid unless it plainly appears that a restriction is imposed by it beyond what the interests of the plaintiff require.

Whether or not a covenant in restraint of trade is reasonable or not is a question of law to be determined by the court and not a question for the jury. *Mallan v. May*, 11 M. & W. 853; *Kellogg v. Larkin*, 3 Chand. 133.

In *Horner v. Graves*, 7 Bing. 743, TINDAL, C. J., laid down this rule: "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, and can only be oppressive, and if oppressive it is in the eye of the law unreasonable."

Thus in *Jones v. Lees*, 1 H. & N. 189, a patentee of improvements in stubbing machines bound the defendant by deed to use the patent during the term for which it was granted, the latter covenanting not to make or vend any such machines during that term without applying the invention to them. This restraint, which was partial with regard to the mode of exercising the trade, but universal in respect of space, was held to be reasonable. So where the patentee of a twist drill and collet sold the same to plaintiff, and covenanted as a part of the transaction, and to induce the sale, not to do any act which might injure the buyer, and at "no time to aid, assist or encourage any competition against the same," the covenant was held valid. *Morse Twist Drill, etc., Co. v. Morse*, 103 Mass. 72; 4 Am. Rep. 513; and see *Van Marter v. Babcock*, 23 Barb. 633.

But a covenant, not to set up or exercise or carry on the trade or business of manufacturing shoe-cutters in the State of Massachusetts, was held unreasonable. *Taylor v. Blanchard*, 13 Allen, 370.

That restrictions, however unlimited, will be upheld if not unreasonable or unnecessary, having regard to the subject-matter, is illustrated by a late English case. *Leather Cloth Co. v. Lonsont*, L. R., 9 Eq. 345. Upon the formation of a company for the purchase and working of a process of manufacture introduced into England from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their powers, allow to be carried on by others in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory of the vendors, and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased. Held, that the restriction was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchaser, and was capable of being enforced against the vendors.

One may sell a secret of business and restrain himself generally from using or divulging it. *Jarvis v. Peck*, 10 Paige, 118; *Alcock v. Giberton*, 5 Duer, 76; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Hardy v. Seeley*, 47 Barb. 423.

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The following contracts have been held void in respect of distance: Restraining a particular trade in the whole State. *Chappel v. Brickway*, 21 Wend. 157; *Lunlap v. Gregory*, 10 N. Y. 241; Not to carry on business in the State of New York west of Albany. *Lawrence v. Kidder*, 10 Barb. 641. But, on the other hand, contracts have been upheld as follows: By an attorney not to practice in Great Britain for the space of twenty years (*Whittaker v. Howe*, 3 Beav. 383), but this case has been questioned; In *Bunn v. Guy*, 4 East, 190, an agreement of an attorney not to practice within London and one hundred and fifty miles from thence; These cases are supported on the theory that the business of an attorney requires a limit of large range; but in *Horner v. Graves*, 7 Bing. 743, an agreement that the defendant, a surgeon-dentist, would abstain from practicing within one hundred miles of York, was held void on the ground that the distance rendered it unreasonable.

In *Whitney v. Slayton*, 40 Me. 231, a contract not to engage in the business of iron casting within sixty miles of Calais for the term of ten years was upheld.

So the agreement of a physician, made for a good consideration, not to practice in the county, was held valid. *Holbrook v. Waters*, 9 How. Pr. 335. So was an agreement by a physician not to practice in a particular town and the vicinity thereof. *Warfield v. Booth*, 83 Md. 63; *Hoyt v. Holly*, 89 Conn. 326; S. C., 12 Am. Rep. 390. So the contract of one partner, on the dissolution of the copartnership, not to carry on the business within twenty miles, was held to be reasonable. *Nobles v. Bates*, 7 Cow. 807.

A contract by an apothecary not to set up business within twenty miles of A, held legal. *Hayward v. Young*, 2 Chit. 407. So where a surgeon took an assistant who entered into a bond not to practice on his own account for fourteen years within ten miles of the place where the surgeon lived, the bond was held good in law. *Davis v. Mason*, 5 T. R. 118. So a covenant not to practice medicine within twelve miles of a certain place was sustained. *McClurg's Appeal*, 58 Penn. St. 51; *S. P. Butler v. Burleson*, 16 Vt. 176.

In estimating the reasonableness of a contract not to exercise a trade or profession within a particular district, the populousness of the district is not to be taken into account. *Mallan v. May*, 11 M. & W. 853; *Green v. Price*, 13 id. 606; S. C. affirmed, 16 id. 846. Thus, covenants by the assistant of a dentist and by a perfumer not to enter into business in London for a certain time were upheld. Id.

Under a contract not to carry on business within a given distance, the distance is to be measured in a straight line, upon a horizontal plane, or as the crow flies, and not by the nearest practicable mode of access. *Durginan v. Walker*, 33 L. T. R. 256; *Moufflet v. Cole*, 7 L. R. Exch. 70; affirmed on appeal, 21 W. R. 175.

On the sale of his business the vendor agreed that he would not exercise or carry on the trade, either in his own name or that of any other person or persons, in a particular town. Held, that his managing the business of another person in the same trade in the town at a weekly salary was not a breach of the agreement. *Allen v. Taylor*, 39 L. J. Chan. 627; affirmed, 19 W. R. 556; 24 L. T. (N. S.) 249. But an agreement not to carry on a business directly or indirectly, either alone or in partnership with, or with the assistance of any other person, was held to be broken by carrying on the business as manager to another person. *Dales v. Weaver*, 18 W. R. 993.

It is laid down by Chitty as the result of the cases, and his authorities support the statement, "that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether." The cases cited in support of this proposition are *Chesman & ur. v. Nainby*, 2 Strange, 739; *Wood v. Benson*, 3 Cr. & J. 94; *Mallan v. May*, 11 Mees. & Welsb. 652; *Price v. Green*, 16 id. 846; *Nichols v. Stretton*, 10 Q. B. 846. In *Price v. Green* the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nichols v. Stretton*, the stipulation was that an attorney's apprentice, who was to serve five years, should not, after his term expired, be concerned as attorney for any persons who had, previous to the expiration of said apprenticeship, been a client of the attorney

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with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients, it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the Exchequer Chamber in *Pries v. Green*, held the contract divisible, and sustained the action.—*R.R.P.*

PEOPLE V. WOODWARD.

(45 Cal. 233.)

Criminal law — Rape.

A person who stands by, when an attempt is made by others to commit a rape but who does no act to aid, assist, or abet its commission, is not guilty of an attempt to commit a rape; the question of his complicity is for the jury. (*See note, p. 177.*)

INDICTMENT for attempt to commit rape. The facts are stated in the opinion.

Charles A. Garter, for appellant.

The Attorney-General, for respondent.

By the COURT. The defendant was convicted of the crime of an attempt to commit rape on the person of a child under the age of ten years; and has appealed from the judgment and from an order denying his motion for a new trial. There was testimony tending to prove that several boys, one of whom was over the age of fourteen and the others under that age, attempted to commit rape on the person of the child, and the defendant, who is of the age of seventeen years, stood by and aided and encouraged the other boys in the accomplishment of their purpose. On the other hand, the defendant, who testified as a witness in his own behalf, though admitting that he was present, denied that he in any wise aided or encouraged the other boys in their unlawful design. The counsel for the defense asked the court to charge the jury as follows:

“If you are satisfied from the evidence that the defendant stood by at the time the offense is alleged to have been committed, but

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did no act to aid, assist, or abet the same, you should find the defendant not guilty."

The court refused to give the charge, and this ruling is assigned as error. We think the charge was improperly refused. If the defendant "did no act to aid, assist, or abet" the perpetration of the crime, he is guilty of no violation of law from the mere fact that he was present. His presence, if unexplained, would be a circumstance tending to show his complicity in the transaction. But it was for the jury to decide from all the facts proved, whether he aided, assisted, or abetted the perpetration of the offense; and if they were satisfied that though present, he did not in fact aid, assist, or abet the perpetrators, it would have been their duty to acquit him. The defendant was entitled to have the jury instructed to that effect.

Judgment reversed and cause remanded for a new trial. Remittitur to issue forthwith.

NOTE. — One aiding and abetting another to commit a felony is guilty of a substantive felony. *Rex v. Tattersall*, 1 Russ. by Grear, 27. He is also called a principal in the second degree; but to make one a principal in the second degree he must be a participant in the act; for, although a man may be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not attempt to prevent the felony or to apprehend the felon. 1 Hale, 439; 3 Foster, 350. So where several persons are in company together, or engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offense, the others will not be involved in his guilt unless the act done was in some manner in furtherance of the common design. *Anon*, 1 Leach, 7; 1 Russ. by Grear, 29; *Rex v. White, R. & R.* 99; *Rex v. Hawkins*, 3 C. & P. 802.

In order to make one an aider and abettor it is necessary that he should do or say something showing his consent to the felonious purpose and contributing to its execution. *State v. Hildreth*, 9 N. C. 440. To make one an abettor, so as to be a principal in the second degree, he must not only be present, but in a situation, or in such contiguity as to enable him actually to render aid. *State v. McGregor*, 41 N. H. 407; *Brown v. Perkins*, 1 Allen, 89.

In *Down v. State*, 26 Ind. 495, the presence of one at the commission of a felony, though he gives no active assistance, but only remains near for the purpose of watching and giving aid, if necessary, was held to constitute him a principal. See also *State v. Squares*, 2 Nev. 226; *Commonwealth v. Chapman*, 11 Cush. 422.

If a conspiracy be proved, and a presence in a situation to render aid, it is a legal presumption that such presence was with a view to render aid, and it lies on the party to rebut it, by showing that he was there for a purpose unconnected with the conspiracy. *Commonwealth v. Knapp*, 9 Pick. 496.

But the mere fact of presence does not alone constitute the person a joint criminal with the active party, or cast on him the burden of proving his innocence. *People v. Ah-Ping*, 27 Cal. 439; *Connaughty v. State*, 1 Wis. 169; *Butler v. Commonwealth*, 2 Duvall, 425; *Plummer v. Commonwealth*, 1 Bush (Ky.), 76. But presence and other conduct may justify the jury in finding an accused person guilty. *State v. St. Clair*, 17 Iowa, 149. See also *Kelly v. Commonwealth*, 1 Grant (Pa.), 484; *Brown v. State*, 23 Ga. 199; *Strawhorn v. State*, 37 Miss. 422. — REP.

People v. The Stockton and Visalia Railroad Co.

PEOPLE V. THE STOCKTON AND VISALIA RAILROAD COMPANY.

(45 Cal. 808.)

Corporation — subscription — payment.

The statute required as a condition precedent to the incorporation of a company, that a certain amount of stock should be subscribed for, and ten per cent in cash thereon actually and in good faith paid in. *Held*, that payment of the ten per cent, made in good faith, by a check drawn against a sufficient fund, and which would have been paid on presentation, was sufficient.

INFORMATION filed by the attorney-general. The complaint averred that the "defendants had associated themselves together under the name of the Stockton and Visalia Railroad Company, unlawfully claiming to be a corporation, and by the name aforesaid are unlawfully acting as such pretended corporation, and have without right or authority usurped the franchise and privilege of a corporation." The complaint then stated the particulars wherein the defendant had failed to comply with the laws in relation to the formation of railroad corporations, which are the same mentioned in the opinion. Judgment of ouster was prayed for. The corporation was the only defendant.

The plaintiff had judgment in the court below, and the defendant appealed.

The other facts are stated in the opinion.

S. W. Sanderson, for appellant.

Byers & Elliott, for respondent.

CROCKETT, J. Waiving the question whether this proceeding was properly instituted against the defendant by its corporate name, or should have been brought against the individuals assuming to exercise corporate powers, we proceed to inquire whether, on the facts established at the trial, the defendant was duly incorporated and is entitled to exercise corporate powers.

Its authority to act as a corporation is assailed on the ground, first, that the affidavit annexed to the certificate of incorporation omits to state that ten per cent of the amount subscribed had been

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paid in cash "in good faith;" second, that the ten per cent was not, in fact, paid in cash, but in checks which were never presented or paid, and which were subsequently returned to the drawers; third, that the company did not, within one year after filing its certificate of incorporation, commence to transact business as a corporation.

We shall notice these points in their order. The court held the affidavit sufficient, taken in connection with the certificate, which contained the words "in good faith."

On the second point the case shows that the ten per cent was paid by bank checks drawn by the subscribers to the stock, on banks located in the city of Stockton, and were payable *in presenti*, and that before accepting the checks the treasurer of the company inquired at the several banks whether they would be paid on presentation, and was assured by the bank officers that they would be; and on the faith of this assurance he accepted the checks as cash, and receipted for the amount represented by them as so much cash. It further appears that the checks would have been paid on presentation at any time while they remained in the hands of the treasurer; but as the company had no immediate use for the money, the treasurer deemed it unnecessary to demand payment for the time being, and shortly thereafter the drawers of the several checks paid to him in cash the amount represented by the checks, whereupon the latter were returned to the respective drawers.

It is clear from the testimony that these transactions were made in perfect good faith, and with no intention to evade the law unless, it may be in the cases of Bours and Bostwick, to be hereafter noticed. Assuming that the checks were delivered and accepted in good faith as cash, with the understanding that they might and would be immediately presented for payment, and assuming further, as we are authorized to do from the proofs, that they were drawn against a sufficient fund, and would have been paid on presentation, and were, in fact, afterward paid by the drawers, the question arises, whether this was a payment in *cash*, within the true intent of the first section of the act of May 20, 1861, providing for the incorporation of railroad companies.

In *People v. Chambers*, 42 Cal. 201, the whole amount to be paid was \$11,000, of which \$10,000 was paid by a check drawn by a person who had no funds in bank to his credit, and the check was never presented for payment, but many

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months afterward was surrendered to the drawer on a settlement of accounts between him and the railroad company. We held that this was not a payment "in cash" within the purview of the statute. But we expressly reserved our opinion on the question whether "a payment of the ten per cent, in good faith, by checks payable *in presenti*, and drawn against a sufficient sum on deposit to meet them, would be a compliance with this requirement of the statute, and particularly if the checks were presented and paid within a reasonable time."

We are now called upon to decide this question, and have no doubt that under the facts disclosed by this record the payment was sufficient. It was a substantial compliance with the statute, and practically was as much a payment "in cash" as though it had been paid in coin. The money was placed completely within the power and under the control of the treasurer, who could at any moment have converted the checks into cash by presenting them for payment. And the good faith of the transaction is established, not only by the direct testimony, but by the fact that the cash was in fact paid shortly after the checks were delivered, and as soon as the money was needed.

The statute should receive a reasonable construction, and whilst its provisions ought not to be allowed to be evaded, as was attempted to be done in *People v. Chambers*, nevertheless a substantial compliance with them will fulfill the intention of the legislature.

But it is claimed for the plaintiffs that the checks given by Bours and Bostwick, two of the subscribers to the stock, were not intended to be presented or paid; and that therefore their delivery to the treasurer was not in good faith. There is evidence tending to show that when these checks were about to be delivered, one Jackson stated to Bours and Bostwick that the checks would not be presented for payment, and Bours testified that he would not have made and delivered his check, except for this understanding with Jackson, whom he styles the president of the railroad company. But, as the checks were delivered before the filing of the certificate of incorporation, it is not very apparent how Jackson could have been the president of a corporation not then organized. But however this may be, the treasurer testifies that he was not a party to, and had no knowledge of, such an understanding, and would not have receipted for the checks as cash, except under the belief that he was

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to be at liberty to present them immediately for payment. It does not appear that Jackson had any authority to make such an agreement with Bours and Bostwick, and as the checks on their face were payable *in presenti*, and the treasurer accepted and receipted for them as cash, without any understanding on his part that they were not to be presented for payment, it is clear that the transaction was not tainted with bad faith so far as the corporation was concerned.

The only remaining point is whether the company commenced to transact the corporate business within one year after the filing of the certificate of incorporation. The proof leaves no room for doubt on this point. Within about six months the company purchased railroad iron of the value of \$22,000, and within twelve months had expended over \$30,000 in the prosecution of its enterprise. Up to the commencement of this action it had expended \$700,000 toward the construction and equipment of its road. So far as appears from this record, the corporation was duly organized, and is entitled to exercise corporate powers.

Judgment reversed, and cause remanded for a new trial.

OAKLAND RAILROAD COMPANY V. OAKLAND, BROOKLYN AND
FRUIT VALLEY RAILROAD COMPANY.

(45 Cal. 365.)

Forfeiture of franchise for non-performance.

If a franchise is granted by the legislature to construct a street railroad within a certain time, with a condition that if the provisions of the act are not complied with the franchise shall be forfeited, a failure to lay the track within the time limited, works a forfeiture of the right to lay the same without a judgment at the suit of the State declaring a forfeiture, and the legislature may confer the franchise upon any other company or person.

THE plaintiff filed a bill praying for an injunction restraining the defendant from constructing a railroad on the east side of the center of Broadway street. An application was made for a pre-

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liminary injunction, which was heard on complaint and answer, and was denied.

The other facts are stated in the opinion.

D. P. Barstow and *C. A. Tuttle*, for appellant.

First — The grant to appellant was for the term of thirty years, and the condition therein that the whole road should be completed within five years from the passage of the act, was a condition subsequent. See *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358; *Thompson v. The People*, 23 Wend. 577; *Spring Valley Water Works v. San Francisco*, 22 Cal. 440; *People v. Manhattan Co.*, 9 Wend. 351.

Second — The proviso in section nine of said act, that if the provisions of the act are not complied with, the franchise and privileges granted shall cease and be forfeited, does not destroy the franchise of its own force, without proceedings commenced on behalf of the State to procure a judgment of forfeiture. *People v. Manhattan Co.*, 9 Wend. 351; *Bear Camp River Co. v. Woodman*, 2 Greenl. 404; 11 Paige, 118; *People v. Hilledale Turnpike Co.*, 23 Wend. 255; *Bank of Niagara v. Johnson*, 8 id. 645.

Third — A failure to comply with a condition subsequent does enable a third party to raise the question in a collateral proceeding. *Kellogg v. The Union Co.*, 12 Com. 19; *Sewall's Falls Bridge v. Fisk*, 3 Foster, 178; *Pearce v. Olney*, 20 Conn. 556; Angell & Ames on Corporations, § 177, and note 1; *Thompson v. The N. Y. & H. R. R. Co.*, 3 Sand. Ch. 625; 5 Mass. 236.

Fourth — Appellant's franchise remains good until judicially declared forfeited in a suit on behalf of the State. *President, etc., v. Trenton Bridge*, 2 Beas. 46; 9 S. & M. 394; *People v. Oakland County Bank*, 1 Doug. 282.

W. W. Crane, Jr., for respondent.

BELCHER, J. This is an appeal from an order refusing to grant an injunction. An order to show cause was made, and upon the hearing the injunction was denied. The motion was submitted upon the complaint and answer, from which the following facts appear:

By an act of the legislature, approved on the 3d day of March, 1866 (Stats. 1865-6, p. 164), the plaintiff, a corporation, was

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granted for the term of thirty years the right to construct and lay down a railway track within the corporate limits of the city of Oakland, and in Alameda county, and to run horse cars thereon, commencing at the southerly end of Broadway, in said city; thence through said street to the northern limits of the city; thence along the telegraph road to the crossing of Temescal creek; thence to the grounds of the College of California.

By the terms of the grant it was provided that from the southerly end of Broadway to the crossing of Fourteenth street there should be two tracks—one laid each side of the center of the street, and as near to the center as they could be placed and allow the cars to pass and repass with safety—and from thence along Telegraph road a single track, continuous with that along the west side of Broadway. It was further provided that work should be commenced within six months, and one track be laid within the limits of the city of Oakland within eighteen months, and the whole road completed within five years from the passage of the act. It was also provided “that if the provisions of this act are not complied with, then the franchise and privileges herein granted shall utterly cease and be forfeited.”

Work was not commenced within six months, nor was one track laid within the limits of the city of Oakland within eighteen months after the passage of the act, but in February, 1868, the legislature passed an amendatory act (Stats. 1867–8, p. 31), whereby it extended the time for the commencement of the work to three years, and for the completion of one track to three years and six months from the passage of the original act, but it left unchanged the time for the completion of the whole road.

Work was commenced and a single track completed within the time named for that purpose in the amendatory act, along the west side of Broadway to the crossing of Fourteenth street, and thence along the Telegraph road to the crossing of Temescal creek; but at the end of five years after the passage of the act of 1866, nothing had been done toward laying down a track on the east side of Broadway, or toward extending the road from Temescal creek to the grounds of the college of California.

In March, 1870, an act was passed by the legislature (Stats. 1869–70, p. 481), authorizing the city council of any incorporated city to grant to any person or corporation the right to lay down and maintain for a term of years an iron railway track or tracks upon

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any street or avenue of the city, and to run cars thereon propelled by horses, and to carry passengers and freight thereon. Under this act the council of the city of Oakland granted to Edward Tompkins and Thomas J. Murphy, their associates and assigns, by an ordinance passed on the 22d of May, 1871, the right to lay down and maintain, for the term of twenty-five years, an iron railroad track upon Broadway, from the southerly end thereof to the northerly charter line of the city, and to run cars thereon to be propelled by horses or mules, and to carry passengers and freight thereon. The grantees accepted this grant, and thereafter, on the 9th day of September, 1871, assigned and transferred to the defendant all their rights and privileges under the said ordinance in and to that part of Broadway lying south of Twelfth street. This assignment was approved by a resolution of the common council of the city, passed on the eighteenth day of the same month, and the defendant was thereby authorized to lay down and maintain a railroad track upon and along that part of Broadway immediately to the east of the plaintiff's track and as near thereto as cars could pass and repass with safety.

On the ninth day of the same month, the plaintiff commenced to lay down a railroad track along the east side of Broadway, from Twelfth street south, and on the twelfth of the month had laid the track as far south as Tenth street. On that day the defendant commenced at Tenth street to lay down its railroad track, south, along the east side of the street, and on the line where the plaintiff proposed to lay its track, and was proceeding with its work when this action was commenced.

No question arises in this case in reference to the plaintiff's right to maintain and use the railroad track constructed by it within five years after the date of its grant. But no track having been constructed, and no steps taken toward constructing one along the east side of Broadway within the time limited by the act, the question is presented as to what rights the plaintiff acquired on that side of the street, and what, if any, it still retains.

It is now claimed for the plaintiff that the condition annexed to its grant was a condition subsequent; that a present right to use the street for the purpose of the construction and maintenance of its proposed railroad became vested in it, and that it could exercise that right at any time, until a forfeiture should be declared in an action commenced for that purpose at the suit of the State.

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The defendant, on the other hand, contends that the condition annexed to the grant was a condition precedent; that the plaintiff took nothing until it entered upon the performance of the work, and that when the time limited elapsed it had no rights whatever in the street, except in so far as it had constructed its road.

Conceding that the plaintiff's grant was upon condition subsequent, still it does not follow that its right in that part of the street where it had not constructed a road could be determined only by a judgment of forfeiture.

The grant was of a franchise, which had the legal character of an estate or property. "An estate," said Chancellor KENT, "in such a franchise and an estate in land rest upon the same principle, being equally grants of a right or privilege for an adequate consideration." 3 Kent's Com. 458.

Now, while a forfeiture at common law does not operate to divest the title of the owner until by a proper judgment in a suit instituted for that purpose the rights of the State have been established, it is otherwise when the forfeiture is declared by a statute. In the latter case the title to the thing forfeited immediately vests in the State upon the commission of the offense or the happening of the event for which the forfeiture is declared, or at such other time and upon such other condition as the statute may name. The authorities to this effect are numerous and uniform.

"It has been proved," said MARSHALL, C. J., "that in all forfeitures accruing at common law nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense; but the distinction taken by the counsel for the United States between forfeitures at common law and those accruing under a statute is certainly a sound one. When a forfeiture is given by a statute the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately or on the performance of some particular act, as shall be the will of the legislature. *United States v. Grundy*, 3 Cranch, 151.

"The forfeiture takes place on the commission of the act prohibited, and by the forfeiture the property is immediately divested out of the owner before any seizure or suit." *Kennedy v. Strong*, 14 Johns. 129.

In some of the cases the question has been directly presented

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whether, after the forfeiture has taken place, but in the absence of any judgment declaring the forfeiture, the former owner could maintain any action in reference to the forfeited property, and it was held that he could not. Thus in *Wilkins v. Despard*, 5 Term R. 112, the action was trespass against the governor of an English colony for seizing a vessel and cargo, the property of the plaintiff. The defendant pleaded that before the seizure the vessel and cargo had violated the navigation act, and had thereby become forfeited to the government. The plaintiff replied that without any sentence of condemnation by a court having competent jurisdiction in that behalf, the defendant had sold and disposed of the vessel and cargo, and converted the same to his own use. To the replication there was a demurrer, which was sustained by the court of king's bench, on the ground that by the forfeiture, which the demurrer admitted, the title of the plaintiff was divested, and he could not therefore maintain the action, although the defendant had not proceeded to a condemnation.

In *Fountain v. Phoenix Insurance Company*, 11 Johns. 293, the action was upon a policy of insurance effected upon the plaintiff's vessel from New York to St. Bartholomew, and at and from thence back to New York, with liberty to touch and trade at Martinique. On her outward voyage the vessel stopped at Martinique, discharged her cargo and was taking on return cargo, when in a storm she was driven on shore and lost. The plaintiff having obtained a verdict for a total loss, a new trial was granted, upon the ground that if the cargo which had been taken on was intended for the United States, it was a violation of the non-intercourse law of the United States, which denounced a forfeiture therefor, by which the vessel would be forfeited and the property immediately vested in the United States, so that the owners would have no longer any insurable interest in her.

In *Bennett v. The American Art Union*, 5 Sandf. 614, the plaintiff, a subscriber to the defendant association, alleged in his complaint that the defendant was engaged in the distribution of works of art to its subscribers by means of a lottery or game of chance; and that unless the defendant were restrained from making the distribution the personal property of the association would be forfeited and wholly lost to its members or subscribers. The court, dissolving a temporary injunction which had been granted, on the ground that upon the face of his complaint the plaintiff had no

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title to relief, said: "The entire property, if the annual distribution is a noxious lottery, before the complaint was filed, was, in my judgment, vested in the State. It was so vested by force of the forfeiture which the statute declares of all property that shall be offered for sale or distribution contrary to its provisions—a forfeiture which by the express words of the law may attach as well before as after the determination of the chance upon which the determination depends." And again: "If the intended distribution, which I am asked to enjoin, is in any criminal sense a lottery, it is the property of the people of the State that this court is required to take into its possession and dispose of for the benefit of the shareholders in the Art Union. It is not probable that we shall soon venture upon such an exercise of our jurisdiction."

In *New York, Housatonic, and Northern Railroad Co. v. The Boston, Hartford and Erie Railroad Company*, 36 Conn. 196, an injunction was sought to restrain the defendant from placing its track upon ground already appropriated for railroad purposes by the plaintiff. The plaintiff had located its railroad through the town of Danbury, and its location had been approved by the railroad commissioners. It had constructed a single track as far west as the site selected for a depot, and had graded for a double track, intending, however, to lay a single track only for the present, leaving the southerly and easterly side of the road bed for the second track whenever the business of the road should require it. East of the depot the defendant had made its location upon the ground prepared by the plaintiff for its second track; and west of the depot it had followed, not exactly the line of the plaintiff's location, but so as to cross it four times in the space of about one mile. This, it was claimed, practically destroyed that part of the plaintiff's road or at least seriously impaired its usefulness. The plaintiff was proceeding to construct its road under the provisions of the acts of the legislature—one, a private act, passed in 1868, extending the time for the plaintiff to complete its road, and the other, a general act, passed in 1867. By the terms of the former act the plaintiff was required to procure and pay for the right of way for its location within twelve months after the rising of the general assembly, or the approval given by the railroad commissioners to the location should be void. By the latter act all companies were required to procure and pay for the right of way of all lands through which they might pass, within twelve months after their survey should be

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accepted by the railroad commissioners, or the acceptance should be void. The plaintiff had failed to procure the right of way within the time limited by either act, and it was contended by the defendant that it had thereby lost its right in the location. The court said: "We think the respondents are right in both claims. So far as the resolution of 1868 is concerned, the case is within its letter and is too clear for argument, unless there is force in the petitioner's objection, that it is in the nature of a forfeiture, and the neglect or omission of the company can be taken advantage of only in a direct proceeding against the company in behalf of the State, for the purpose of procuring a judgment of forfeiture. But we think this position is not tenable." The court further said: "The principal, and perhaps the only object which the legislature had in view was to prevent such surveys from being a cloud upon the title of real estate an unreasonable length of time. We shall give effect to that intention best by holding that the statute is operative and effectual at the instance of the owner of the land — the party directly interested — and for whose protection the statute was passed, independent of any action by the State. Any other construction would impair the effect of the statute, and might, in some cases, defeat the legislative intent altogether."

In *Borland v. Lewis*, 43 Cal. 569, the action was ejectment to recover a parcel of swamp and overflowed land. The plaintiff had purchased the land of the State on a credit of five years, under an act authorizing such credit, upon payment of one year's interest in advance, and the interest thereafter annually in advance. Among other things, the act provides that "if any person or persons purchasing lands upon a credit of five years, as provided in section 5 of this act, shall fail or neglect to pay the principal and interest within the said term of five years from the date of the certificate of purchase, or shall fail or neglect to pay the interest, as required by this act, for the space of one year from the time such interest may become due, or shall fail or neglect to reclaim at least one-half of the land so purchased within the said term of five years, such neglect or failure shall work a forfeiture of such land, and the same shall be resold as if no purchase had been made." The plaintiff had not paid the interest as required; but it was contended, in his behalf, that there could be no forfeiture for that reason, until the same should be judicially declared in an action commenced for that purpose. But it was held by the court that the act intended to

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make the failure to pay interest for one year after it became due operate as a complete forfeiture of all the purchaser's rights in the land, and the defendant was, therefore, permitted to avail himself of the plaintiff's want of title to defeat the action.

In this case it is clear that the legislature intended, by the restriction as to the time within which the plaintiff's work must be completed, that it should have no rights in the streets of Oakland if it failed to exercise them within five years. This intention was expressed in the most explicit terms, for, as we have seen, it declared that upon failure to comply with the provisions of the act, "then the franchise and privileges herein granted shall utterly cease and be forfeited." Not to give effect to this declaration would be to frustrate and defeat the legislative will.

It is also claimed for the plaintiff that the act of March, 1870, did not authorize the city council to make any grant to Tompkins and Murphy of the right to lay down a railroad track on Broadway, since that street was already partially occupied by the plaintiff. The proviso to section 1 of the act, when taken in connection with the preceding portion of the section, may not be altogether clear in its meaning; but we think the true construction of it is, that when one railroad has been constructed in a street, and another company desires to use it jointly with its owners, it may be authorized to do so, upon the terms specified, for two blocks, but that it was not intended to be a limitation upon the power already given to grant an independent right.

The last point made is, if the council had authority to make the grant to Tompkins and Murphy, that they, having the right to lay down a track along Broadway, from the southerly end thereof to the northerly charter line of the city, could not assign to the defendant a part of that right, and thus divide their franchise. It may be that the franchise ought not to be divided; that the public would be better served if the road were continuous, under one management, from the southern to the northern end of the street; but if it be so, it is a matter which concerns the public, and not the plaintiff.

It follows that the court did not err in refusing the injunction, and its order is affirmed.

REDINGTON v. WOODS, appellant.

(45 Cal. 406.)

Raised check — payment by drawee — laches in failing to return altered check — Indorsement.

Plaintiff gave to a stranger his check on a bank for thirty dollars. The stranger afterward presented it, raised in amount and so altered as to make defendant the payee, to defendant in payment for legal tender notes, and defendant received it in good faith and delivered the legal tender notes. Defendant indorsed it and presented it to the bank on which it was drawn for payment and it was paid. The forgery having been discovered, the defendant was notified thereof, but no formal demand for a return of the money paid him was made for nine days, nor was the check ever returned or offered to be returned to defendant. In an action by the plaintiff to recover the money it was stipulated that the court might determine whether the loss should fall on the plaintiff, the defendant or the bank. *Held*, (1) that the bank was not presumed to know the handwriting in the body of the check, and that, in the absence of suspicious circumstances or of *laches* after the discovery of the fraud, the bank would be entitled to recover the money paid; but that the failure of the bank or of the plaintiff to return or to offer to return the check, was a valid defense to the action. (2) That defendant's indorsement imposed upon him no other or greater liability to refund the money paid than would attach to him without the indorsement.*

ACTION to recover money paid on a raised check. The opinion states the case.

John Currey, for appellant.

Winans, for respondents. The indorsement of Woods & Cheesman, the defendants, was a guarantee of the genuineness of the check. The rule is absolute and unqualified, that an indorser guarantees, by his indorsement, that he has a clear title to the bill, note or certificate indorsed. Nor are checks any exception to the rule. *Mills v. Barney*, 22 Cal. 248.

The evident meaning is that the defendants, by their agent, Hayden, undertook and agreed that the signature of Cox was genuine; consequently Mills, the banker, who issued the certificate of deposit to Cox, as payee, and who paid it to Wells, Fargo & Co.,

* See *National Bank of North America v. Bangs*, 8 Am. Rep. 249.

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upon their indorsement, afterward recovered the money back from them upon showing that the previous indorsement of Cox was a forgery, and that he had been compelled, therefore, to pay the certificate to Cox. *Olivier v. Landry*, 7 La. 496.

The last indorsement of a note or bill is a guarantee of all preceding indorsements; it admits the handwriting of the drawee and all prior indorsers. The last indorser is consequently liable, although the preceding indorsements were forgeries. *Harris v. Bradley*, 7 Yerg. 310.

There is a warranty implied in the transfer of every negotiable instrument that is not forged. *Herrick v. Whitney*, 15 Johns. 240; *State Bank v. Fearing*, 16 Pick. 533; *Smith v. Chester*, 1 Term, 654; *Lambert v. Pack*, 1 Salk. 127. And that the rule applies to checks as well as other commercial paper is shown by the case of *Murray v. Judah*, 6 Cow. 483, where it is held that one who has transferred a check impliedly warrants his title and the genuineness of the paper. Says the court (page 491): "The objection seems to be that Foote was responsible upon the implied warranty of the genuineness of the check, and of his own title to it, which it has been repeatedly held accompanies the transfer of all negotiable paper."

By holding that the indorser of a check warrants the "title" the court there meant, as does also this court in *Mills v. Barney*, that he warrants title to it for the amount named, as well as in other respects; since, if the check be indorsed, and payment demanded for an altered and simulated amount, in excess of the genuine sum for which the check was drawn, the indorser has no title to it to the extent of such excess. Indeed, he warrants the genuineness of the paper; and that genuineness applies no less to a forgery of the sum than to a forgery of the signatures.

In *Minturn v. Fisher*, 4 Cal. 37, this court decides that "there is little or no difference between checks, so-called, and bills of exchange, except as far as that difference may arise from the custom of merchants, or the statute regulations of the particular jurisdiction in which they are used. They are similar in form, and the modern decisions of the courts have placed them on the same footing. *Dick v. Leverich*, 11 La. 576; *Talbot v. Bank of Rochester*, 1 Hill, 295; *Hartsman v. Henshaw*, 11 How. 183.

Where a bank pays an altered check it can recover back, from the party to whom such payment was made, the difference between the true amount and that to which it was altered, in all

cases, and as well without as with the indorsement of the party to whom it was paid.

In Morse on Banks and Banking, 300, this question is thus presented: "The rule requiring the bank to know the customer's handwriting is confined in its practical effect to requiring a knowledge of his signature. Neither law nor the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the drawer's hand. Nevertheless, a false or fraudulent alteration in a material point, made in the body of the check or bill, renders the document a technical forgery, just as much as the simulating of the signature itself. Knowledge of the drawer's signature is of course no possible guide for the detection of this description of forgery, and in such cases a modification of the general rule that payment on forged paper is no payment, has to be made in reference to the sheer necessities of justice." *Sewall v. Boston Water Power Co.*, 4 Allen, 277; *Goodman v. Easton*, 4 N. H. 455; 2 Parsons on Bills and Notes, 583.

And again, Morse on Banks and Banking, 309: "The rule was laid down in the case of *The Canal Bank v. Bank of Albany*, 1 Hill, 287, that acceptance and payment, or either, concludes the drawees, as against the payees, only as to the genuineness of the drawer's signature. If anywhere in the chain of orders or indorsements there is a forgery, the bank may recover back, even though a considerable time has elapsed since the payment, provided that it acts with due promptitude and despatch, as soon as the discovery is made."

Upon this point the leading authority is that of *The Bank of Commerce v. Union Bank*, 3 N. Y. 230; and the opinion of the court there, if recognized as law, must be conclusive of the case at bar.

The rule is absolute, that when money is paid on a forged draft, where the parties are in mutual fault, and are equally bound to inquire, payment can always be recovered back.

In *Merchants' Bank v. McIntyre*, 2 Sandf. Sup. C. 431, where a draft on a bank was presented for payment by a remote indorsee, to whom it was paid, both parties being ignorant of the fact that the first indorsee, to whom it was specially indorsed, had never indorsed the draft, but that a fictitious signature, resembling his, was placed on the draft, it was held that money paid under a mutual mistake of facts may be recovered back, and that, on dis-

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covering the fraud, the bank could recover the amount from the party to whom it was paid.

An elaborate review of the principal cases on this point is presented in *Ellis & Morton v. Ohio Life Insurance and Trust Co.*, 4 Ohio St. 628; *Price v. Neal*, 3 Burrows, 1355; *Lang v. Adams*, 6 Mass. 187; *Markle v. Hatfield*, 2 Johns. 462; *Wilkinson v. Johnson*, 3 B. & C. 435; *Canal Bank v. Bank of Albany*, 1 Hill, 290.

These objections, viz. : that plaintiffs lost their rights by laches, in neglecting to give notice of the forgery, and by not making a timely demand for repayment, and by not tendering to defendants a return of the forged check, are urged by defendant as constituting a defense to this action. But the authorities do not sustain them in either proposition. *Canal Bank v. Bank of Albany*, 1 Hill, 291; *Chitty on Bills*, Am. ed. of 1839, p. 463; *Goddard v. Merchants' Bank*, 4 Com. 156; *id.*, 2 Sandf. 256; *Bank of Commerce v. Union Bank*, 4 Coms. 237; *Ellis v. Ohio Life Ins. and Trust Co.*, 4 Ohio St. 656; *Merchants' Bank of N. Y. v. Exchange Bank*, 8 La. 670; 16 La., old ed., 457.

As to plaintiffs' omission to tender a return of the altered check, defendants seem to press it as a defense, or, at least, a makeweight in their favor, that "no offer to return the check was made," and say "the defendants were certainly entitled to the check, if they were to be charged with its loss, even though it possessed no intrinsic value." Certainly, if it possessed no value, a neglect to return it would not constitute a defense, for *lex neminem cogit ad vana*, and, besides, if they were entitled to it, it was their business to ask for it, when it would have been given them, without a doubt. The possession of something so worthless was not considered by either party a subject of sufficient importance to become a matter of consideration; and the present use, as an argument on defendants' behalf, of plaintiffs' failure to tender a return, is nugatory.

CROCKETT, J. The plaintiffs were merchants doing business in San Francisco, and kept their bank account with the "London and San Francisco Bank, Limited." On the 11th of February, 1870, they sold to a stranger a small bill of goods, who, after concluding his purchase, requested them to issue to him their check for thirty dollars, which he said he desired to send to the country. The request was complied with and the check issued in the usual form, payable to John Crane or order, and the stranger paid to the plaintiffs for the check thirty dollars in gold coin. On the follow

ing day a person, who was unknown to the defendants (who were stock and money brokers, also doing business in San Francisco), called at their place of business and inquired the price of United States legal tender notes, saying he wished to purchase \$3,500 of such notes. On being informed that the defendants would sell him the notes at a specified price, he left without concluding the purchase, but returned in about half an hour and produced a check purporting to have been made by the plaintiffs, bearing date on that day (February 12th), and payable to *the defendants* or order, for \$2,931.25, drawn on the "London and San Francisco Bank, Limited," with which bank the plaintiffs kept their bank account. The amount specified in the check was the exact sum requisite to purchase \$3,500 in legal tender notes at the rate before mentioned. The check was offered and accepted in payment for the notes; but as the employees of the defendants, who were making the transaction, were wholly unacquainted with the person who offered the check, they deemed it prudent to send it to the bank for payment, whilst they were counting out the notes. The check was accordingly indorsed by the defendants, and a messenger was dispatched with it to the bank for collection. The messenger proceeded immediately to the bank and presented the check to the paying teller, saying that the defendants "knew the house of plaintiffs was all right, but that they did not know the man who presented it, who was a stranger, and they asked him to go to the bank and collect it for them." After first looking at the face of the check and then at the back of it, the teller, in answer to the question of the messenger, "Is that good?" remarked that it was all right, and immediately paid the check, and stamped it with the usual words indicating payment by the bank. But, before the messenger reached the defendants' place of business with the money, the transaction with the stranger had been concluded and he had left the defendants' office with the legal tender notes several minutes before the messenger returned. One of the clerks of the defendants, however, followed a short distance behind the stranger for a block or two, so as to observe his movements, until the latter entered a cellar on Kearny street and was out of sight; whereupon the clerk returned to the office, and on his arrival found the messenger there with the money received for the check. On the first or second of the following month the plaintiffs and the officers of the bank discovered for the first time

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that the check issued by the plaintiffs on the eleventh of February, for thirty dollars, had been fraudulently altered by changing the date from the eleventh to the twelfth of February, and by inserting in the body of it the name of the defendants' firm as payees, and by raising the amount from thirty dollars to two thousand nine hundred and thirty-one dollars and twenty-five cents, and in this altered form the check was paid by the defendants, as above stated. On the same day on which the fraud was discovered the plaintiffs and the officers of the bank notified the defendants of it; but no formal demand was made upon the defendants for a return of the money until the ninth of March. The check has never been returned or offered to be returned to the defendants; but immediately on the discovery of the fraud the plaintiffs and the bank employed detectives to search for the person who delivered the check to the defendants; but they were unable to find him, and he has not been discovered.

The court finds that the defendants received the check in good faith, in the usual course of business, and for a full and valuable consideration. It also appears from the findings that it was the custom for each member of the plaintiffs' firm to draw and fill up checks, and that occasionally the body of the check was filled up by a book-keeper or clerk; and that for the whole period during which these checks were being drawn and paid the paying teller of the bank was the same who paid the check in question in this action. It further appears that the writing in the altered check, except the signature of the drawers, was in a heavy hand, and unlike in appearance any of the genuine checks produced at the trial, of which there were more than forty, drawn during the same month in which the altered check was issued. The court also finds that the defendants never doubted the genuineness of the check, but wanted it cashed, as they did not know how the man who presented it came by it.

A stipulation was filed in the cause to the effect that in order to avoid circuitry of action and to end litigation concerning the check and its payment, the court might determine in this action whether the loss should fall upon the plaintiffs, the defendants or the bank, and might enter the appropriate judgment with like effect as though the appropriate action had been brought. On these facts the court entered a judgment for the plaintiffs, from which the defendants have appealed.

The rule is well settled that the drawee of a check is bound, at his peril, to know the handwriting of the drawer; and if he pays a check to which the signature of the drawer was forged, he must suffer the loss, as between himself and the drawer, or an innocent holder to whom he has made payment. As between himself and the drawer, he undertakes that he will pay no checks, except such as have the genuine signature of the drawer, which he assumes to know; and as he is presumed to be acquainted with the signature, he will not be allowed to recover the money back from an innocent holder, who is not presumed to have such knowledge. But there is no presumption that the drawee is acquainted with the handwriting in the body of the check, inasmuch as checks are often filled up in the handwriting of persons other than the drawer, and with which the drawee is not presumed to be familiar, and may have had no opportunity whatever to become acquainted. If the rule were otherwise, the drawee could never safely pay a check filled up in a handwriting that was new to him, until he had first satisfied himself by inquiry from the drawer whether the check had been properly filled up. This would result in such delay and inconvenience as greatly to interfere with commercial transactions, which are so largely carried on by means of checks. The rule is, therefore, now well settled, that if the drawee, in good faith and without negligence, pay even to an innocent holder a check which has been fraudulently altered in amount, after it left the hands of the drawer, he will ordinarily be entitled to recover back from the person to whom it was paid the excess over the true amount of the check. "The rule requiring the bank to know the customer's handwriting is confined, in its practical effect, to requiring a knowledge of his signature. Neither law nor the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the drawer's hand. Nevertheless, a false or fraudulent alteration in a material point, made in the body of the check or bill, renders the document a technical forgery, just as much as the simulating of the signature itself. Knowledge of the drawer's signature is, of course, no possible guide for the detection of this description of forgery, and in such cases a modification of the general rule, that payment on forged paper is no payment, has to be made in deference to the sheer necessities of justice." Morse on Banks and Banking, 300.

In the *Bank of Commerce v. Union Bank*, 3 N. Y. 234, Rug-

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GLES, J., in delivering the opinion of the court, says: "The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer's signature, which he is not afterward, in a controversy between himself and the holder, at liberty to dispute. * * * The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer, from this imputed negligence, must bear the loss." In support of this proposition he quotes *Price v. Neal*, 3 Bur. 1354; *Wilkinson v. Suteridge*, 1 Strange, 648, and Story on Bills, § 262, to which many other authorities might be added. "But," he says, "it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill. There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. * * * No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorser to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust." The same principle is recognized in *National Park Bank v. Ninth National Bank*, 55 Barb. 124, in which, after conceding that the drawee of a check is bound, at his peril, to know the signature of the drawer, the court says: "But the liability extends no further; and where the genuine draft has been altered, not only in the name but in the amount to be payable, I do not think that rule should hold the drawer liable for any more than the amount of the original draft, and for the balance the plaintiff should recover. * * * I think the rules, as heretofore settled, viz.: that the drawee is bound to know the handwriting of the drawer, and is liable for a draft which he pays, although forged, and the other, that where the body of the draft is altered, the drawee may recover the amount from the person receiving it, may be applied to this case, and should lead to the result before stated." The same case was taken to the court of appeals, and is reported in 46 N. Y. 77; 7 Am. Rep. 310. In that court the judgment

was reversed on the ground that the *signature* of the drawer was forged, and for that reason the drawee was not entitled to recover. But there is nothing in the opinion of the court in conflict with the proposition that if the signature of the drawer had been genuine, and the bill had been altered only in the amount, the drawee would have been entitled to recover. There is, indeed, little or no conflict in the authorities on this point, and the rule, that the drawee is not presumed to know the handwriting in the body of a bill or check, and is not bound, before payment, to ascertain, at his peril, that the amount has not been altered in the body of the bill, is founded on principles of reason and justice, and ought not to be disturbed. There may, however, be exceptions to this general rule. If the alteration be made in such manner that on the face of the paper there appears enough to excite a reasonable suspicion of fraud, or if the drawee has information which would lead a prudent person to suspect that the bill had been altered, it would, doubtless, be his duty to decline payment until the doubt was removed.

I am, therefore, of opinion, that if there were no such suspicious circumstances in this case, and if the bank was guilty of no *laches* after the discovery of the fraud, it is entitled to recover.

It is claimed, however, for the defendants, that the handwriting in the body of the check, so different from that usually found in the plaintiffs' checks, was of itself sufficient to excite a well-founded suspicion in the paying teller that the check had been tampered with ; and that, when there was superadded to this the information given to him by the defendants' messenger, common prudence required that he should investigate the matter before payment. We have already seen that the fact that the handwriting in the body of the instrument was not that of the drawer raised no presumption that the check was not genuine. The findings show that checks of the plaintiffs' firm were filled up, sometimes by the member of the firm who signed the firm name to it, and at other times by the clerks and book-keepers ; and the bank teller cannot be presumed to know but that the plaintiffs had employed a new clerk or book-keeper who had filled up the check. But aside from this consideration, the mere fact that the body of the check was in a different handwriting from that usually employed was not of itself sufficient to raise the slightest suspicion of fraud. The practice is so common in all commercial communities of causing checks of the same drawer to be filled up in different handwritings, that it is not

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... be presumed the attention of the drawee will be particularly called to the handwriting in the body of the paper. It is the signature which verifies the instrument and not the writing in the body of it, and if the signature be genuine and the writing in the body of the paper in the usual form, though in a different handwriting from that usually employed, there will be nothing in the latter circumstance to excite the slightest suspicion of fraud.

Nor was there any thing stated by the messenger to the teller which could justly arouse a reasonable doubt in respect to the genuineness of the check. The only fact stated by him was that the "defendants knew the house of plaintiffs was all right, but that they did not know the man who presented it (the check), who was a stranger, and they asked him to go to the bank and collect it for them."

The only fact included in this statement was that the man who presented the check was a stranger to the defendants, and if this of itself should have put the bank upon inquiry, much more should it have had that effect with the defendants themselves, who were about to part with a large sum of money to the stranger on the faith of this check, and who had brought it to them payable to their order, and for the precise sum necessary to purchase the legal tender notes. There was certainly more to excite the suspicion of the defendants than of the teller, and yet, instead of sending their messenger to the plaintiffs to ascertain if the check was genuine, and how it came into the stranger's possession, they sent him to the bank with no other instructions than to collect the money. They did not expect the teller to enlighten them as to the stranger or how the check came into his possession. If they were seeking information on that point, they would naturally have applied to the drawers of the check, and not to the officers of the bank, who could not be supposed to have any information on the subject. If there was negligence on either side, it was on the part of the defendants and not the bank. *Commercial and Farmers' National Bank v. First National Bank*, 30 Md. 11.

But it is said the bank was guilty of *laches*, after the discovery of the fraud, in not promptly demanding payment of the defendants, and in not having returned or offered to return the check. It appears from the findings that on the same day on which the fraud was discovered, the defendants were notified of it, but a

formal demand of payment was not made until about nine days thereafter.

It is clear that a demand was not necessary, if viewed in the light of a condition precedent merely. If necessary at all, it was only on the ground that in view of it the defendants may have had an additional motive for greater diligence in searching for the forger and seeking restitution.

During the nine days which elapsed after the discovery of the fraud, and before payment was formally demanded, the defendants may possibly have omitted all effort to discover the person from whom they received the check, under the belief that the plaintiffs or the bank had concluded to submit to the loss.

If the omission to make the demand promptly is entitled to any weight (a point not decided), it is only for the reason that the defendants may thereby have been lulled into security, and have omitted efforts they would otherwise have made to procure indemnity. In that view, the failure to make the demand may possibly have been *laches*.

But I deem it unnecessary to decide the point in this case. The failure to return, or offer to return, the altered check to the defendants, presents a question of more difficulty. In the case of the payment of counterfeit bank notes, the rule appears to be well settled that, in order to recover the consideration from a person who innocently paid them out, the holder must return them promptly. The case of *Gloucester Bank v. Salem Bank*, 17 Mass. 33, was an action of that character; and the court held that a delay of fifteen days in returning the notes was fatal to the action. In delivering the opinion of the court, Chief Justice PARKER says: "The true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received."

After saying that the delay of fifteen days was too great, he continues: "The defendants then had no means of looking up those from whom they had received the notes; and, although there is no evidence in the case from which it can be ascertained that they could have saved themselves if they had received earlier notice, the law will presume that a change of circumstances had taken place, which would justify them in resisting the action."

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The same rule was announced by the supreme court of the United States, in the case of the *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333. This, also, was an action to recover the consideration paid for counterfeit bank notes, which were not offered to be returned until after the lapse of nineteen days from the time when they were received. Mr. Justice STORY, in delivering the opinion of the court, says: "The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and, therefore, to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will, therefore, presume a damage actual or potential sufficient to repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt, there has been a qualification engrafted on the general doctrine: that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility." In *Thomas v. Todd*, 6 Hill, 341, Mr. Justice BRONSON says: "Although the bill has no intrinsic value, it should be returned to the debtor, so as to enable him to trace out and fall back upon the person from whom he received it. And for the same reason the bill should be returned, without any unnecessary delay."

These cases, it is true, grew out of the payment of counterfeit bank notes; and we have been referred to no case adjudicating the precise point involved in this action, nor have we been able to find one, after a somewhat diligent examination of the books. In the case of counterfeit bank notes, the person who receives them is held to great diligence not only in returning them on the discovery of the forgery, but also in the detection of the fraud. In the case of the *Gloucester Bank v. Salem Bank*, *supra*, the court held that the person receiving such notes "*must examine them as soon as he has opportunity*, and return them immediately. If he does not he is negligent, and negligence will defeat his right of action."

The reason assigned for the strictness of the rule is, that delay in returning the notes would render it more difficult to trace out the person from whom the prior holder had received them, and to obtain restitution of the consideration paid for them. As between two innocent persons, neither should be allowed to impair or

jeopardize the rights of the other by any negligence whatever, and he who commits the negligence should suffer the loss.

In the case of bank notes, a greater degree of diligence in detecting the fraud and returning the notes would doubtless be exacted than in respect to forged bills of third persons received in payment of a debt; concerning which, as we have seen, Judge STORY said in *Bank of the United States v. Bank of Georgia, supra*, that "the notice and *return* must be within a *reasonable* time; and any neglect will absolve the payer from responsibility." In general it is more or less difficult to identify a particular bank bill as that which was received from a particular person; and in a majority of cases it would perhaps be impossible to do so after a considerable delay. For this reason the return should be more promptly made than in the case of a forged bill of a third person. But in each case the person from whom the spurious paper was received is entitled to the fullest opportunity to obtain indemnity, if he can, from the prior indorsers or guarantors, if there be any, and if there be none, then from the person to whom he paid the consideration. If there be prior indorsers to whom he may look, it is quite obvious that his remedy would be incomplete, and perhaps ineffectual, without the possession of the forged paper. There may have been several prior indorsers, and each in turn would be entitled to the bill in order the more effectually to assert his rights against those who preceded him. But if there were no prior indorsers his remedy against the person from whom he received the forged check or bill is plain. If the defendants in this case had refunded the money on being notified of the forgery, or on the subsequent demand of payment, their right to proceed against the stranger from whom they received the check would have been unquestionable; and it is clear that they could not effectively have prosecuted civil proceedings against him without the possession of the check. It may possibly be that he also was innocent of the fraud and received the check in good faith; in which event, on refunding the money he received, he would be entitled to the check to enable him to assert his rights against the person from whom he received it. But it is insisted on behalf of the plaintiffs: First, that the defendants waived a return of the check; and second, that a return of it could not have benefited them inasmuch as the person from whom they received it immediately disappeared, and cannot now be found after diligent search.

On the first point it is sufficient to say that the record furnishes

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no evidence of a waiver; and on the second point the reply may be found in the language of Judge STORY, already quoted, where he says "the law will presume a damage actual or potential, sufficient to repel any claim against the holder;" or in the words of Chief Justice PARKER in *Gloucester Bank v. Salem Bank*, "the law will presume that a change of circumstances had taken place which would justify them in resisting the action."

I am, therefore, of opinion, that a failure to return, or to offer to return, the check to the defendants is a valid defense to the action; and on this ground the judgment must be reversed, and the cause remanded for a new trial. But in view of another trial, it may be proper to notice the proposition urged by the plaintiffs, to the effect that by indorsing the check the defendants guaranteed that it was genuine in respect to the amount appearing on its face. There is no conflict in the authorities on the point, that the holder of a bank check, who accepts payment, thereby undertakes that all indorsements prior to his own are genuine, and that he is the lawful holder and owner of it. As we have already seen, he does not undertake that the signature of the *drawer* is genuine. With that the drawee is presumed to be acquainted, and is bound, at his peril, to know it. But there is no such presumption in respect to the signatures of the payee and indorsers, all of whom may be strangers to the drawee, and of whose handwriting he is not presumed to have any knowledge. When, therefore, the holder presents a check or bill for payment, the title to which he derives through prior indorsements, he undertakes with the drawee that these indorsements are genuine, and that he has a valid title, and, consequently, a right to receive the money. If it afterward transpires that one or more of the indorsements are forged, the drawee will be entitled to recover back the money from the person to whom he paid it, on the ground that the latter had no title to the bill or check, and the payment was, therefore, made without consideration, under an innocent mistake. But the indorsement of the holder receiving payment can have, at most, no greater legal significance than this. It implies, at best, only an undertaking that he has a valid *title* to the bill or check, and, consequently, a right to receive payment—an implication which the law raises without the indorsement. But the indorsement *proprio vigore*, imposes upon him no other or greater liability to refund money paid upon an altered check than would attach to him without the indorsement. In other words, the indorsement

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does not, of itself, import an undertaking that the check has not been altered; and in proceedings to recover back the amount paid on an altered check the indorsement could not be made the foundation of the action, as importing a promise to refund the money, in case it should afterward appear that the amount in the body of the check had been fraudulently altered. In such cases the right of recovery does not rest, in whole or in part, upon the indorsement, as importing such a promise, but upon the fact that the money was paid by the drawee without consideration, under an innocent mistake. The authorities in support of this view of the question are numerous and uniform, and we have been referred to none to the contrary.

Judgment reversed and cause remanded for a new trial.

BURKE, appellant, v. CASSIN.

(45 Cal. 467.)

Trade-mark — maker's name — Geographical and descriptive words.

Wolfe had for a long time made and sold gin labeled "Wolfe's Aromatic Schiedam Schnapps." Cassin began the manufacture of gin, which he bottled in imitation of Wolfe's, and labeled "Van Wolf's" or "Von Wolf's Aromatic Schiedam Schnapps." *Held*, that Cassin would be restrained from using any colorable imitation of Wolfe's name, or bottles or labels, but that neither of the words "Aromatic Schiedam Schnapps" was entitled to protection as a trade-mark.*

ACTION to enjoin the use of a trade-mark brought by Udolpho Wolfe against Francis Cassin and P. J. Cassin. Wolfe died, and his executor, David Burke, continued the action.

A preliminary injunction was granted on the complaint when the suit was commenced. The defendants answered, and moved, on the answer and affidavits, for a dissolution of the injunction. The motion was granted, and the plaintiffs appealed from the order.

The other facts are sufficiently stated in the opinion.

* See *Wolfe v. Barnett*, ante, 111. Under what circumstances a name will be protected, see note to *Meriden Britannia Co. v. Parker*, 12 Am. Rep. 410. — REP.

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Cowles & Drown, for appellant.

Pringle & Pringle, for respondents.

RHODES, J. From the year 1848 to the time of the commencement of these actions Udolpho Wolfe, the plaintiff's testator, who has died since the commencement of these actions, has been engaged in the manufacture of gin at Schiedam, in Holland, and in the importation of it into New York, and in the sale of it in different places in the United States. The gin is put up in bottles having labels attached, and the bottles are inclosed in wrappers also having labels thereon, and are packed in boxes, upon which are stamped certain words which appear on the labels. Wolfe claims as his trade-mark the words: "Wolfe's Aromatic Schiedam Schnapps." The defendants are engaged in manufacturing or compounding and offering for sale, at San Francisco, gin, or an article which resembles gin, but which is inferior in quality to that which is sold by the plaintiff; and the labels and stamps which they place on their bottles and the wrappers and boxes bear a striking resemblance to those which are used by the plaintiff. The labels used by the defendants in one of the actions represent the commodity to which it is attached as "Von Wolf's Aromatic Schiedam Schnapps;" and those which are used by the defendants in the other action represent it as "Van Wolf's Aromatic Schiedam Schnapps." The plaintiff claims that the use of those words, stamps, and labels by the defendants is a violation of his trade-mark.

A trade-mark is a word, symbol, figure, form or device, or a combination thereof, adopted or devised and used by a manufacturer or vendor of goods to designate the origin or ownership of his goods, and is used by him to distinguish his goods from those which are manufactured or sold by others. A violation of a trade-mark consists in the adoption or colorable imitation thereof, and its use by the wrong-doer on his goods in such manner that the purchasers of the goods of the wrong-doer are deceived, or liable to be deceived, and induced to believe that such goods were manufactured or sold by the owner of the trade-mark. In its essence, it is a false representation in respect to the origin or ownership of the goods to which the false or simulated trade-mark is attached. There is but little conflict among the cases in regard to the rules of law governing the acquisition or enjoyment of the right of a trade-mark, or those

applicable to controversies growing out of the violation of those rights; but the principal difficulties arise in the application of those rules to the varied and sometimes complicated facts of the several cases. One of those rules is that a word, figure, etc., in common use, which indicates the name, nature, kind, quality, or character of the article, cannot be appropriated as a trade-mark; and even a new word, which is devised for a new preparation, compound, or article, will not be protected as a trade-mark, as is held by many well-considered cases; but there are others which lay down the contrary doctrine.

The name which the plaintiff employs to designate the article which he sells is "Schiedam Schnapps," or "Schnapps." The affidavits used on the hearing of the motion to dissolve the injunction tend to show that the word "Schnapps" was in common use in Holland, and to some extent in the United States, at the time of its adoption by the plaintiff. Its primary signification probably was "dram" or "drink," but it had long been used to designate gin manufactured at Schiedam. That word, therefore, could not be appropriated by the plaintiff as his trade-mark. Had it not been used in New York, or elsewhere in the United States, as the name of gin, prior to its adoption by the plaintiff, he still could not maintain his claim to it. Could he secure his claim to the word on the ground that it was not in use in the United States, prior to the time when he adopted it, the law for the protection of trade-marks would be shorn of most of its strength, for on the same principle other persons would be at liberty to adopt and use the word in other cities, States, or countries, if at the time of its adoption by them it was not in use in such cities, States or countries. The rule for the exclusion of a word in common use is co-extensive with that for the protection of a word which was rightfully adopted as a trade-mark.

Nor can the word "Schiedam" be adopted as a part of the plaintiff's trade-mark. It is claimed as indicating origin — the place of manufacture of the plaintiff's gin; but the evidence shows that there are other manufactories of gin at that city besides that of the plaintiff, and the word has long been used to denote quality or kind. A party would not be entitled to be protected in the use of the word "Havana" as a trade-mark for his segars, even as against a party whose segars were neither manufactured or sold at Havana, for that word is used as descriptive of the kind or quality of the segars.

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The word "aromatic" is employed as expressive of one of the qualities of the plaintiff's liquor, and therefore cannot be claimed as a trade-mark.

The name of the manufacturer or seller of goods may, of course, be used as a trade-mark, and the adoption of the same name as a trade-mark for goods of the same kind by a person bearing a different name is without justification or excuse, and presents one of the clearest cases of piracy of a trade-mark. The name of the plaintiff is "Wolfe," and the name, as printed in the defendants' labels, is "Wolf," and has the prefix "Van" or "Von." The latter, as we understand the affidavits, are mere prefixes, and have no greater significance than would the abbreviation "Mr." in the same position. The omission of the final letter of the plaintiff's name does not work a material change of the name. A slight change in the name is an artifice often resorted to by those who offer in the markets their goods as the goods manufactured or sold by another; but the cases show that it meets with no favor from the courts. We are clearly of the opinion that "Van Wolf" or "Von Wolf" are but imitations of the plaintiff's name, and are violations of his trade-mark.

It will readily be seen upon a comparison of the labels of the plaintiff with those of the defendants that they are in many respects different, but in other respects there is a marked resemblance. The similarity could not have been accidental. The design on the part of the defendants to imitate the plaintiff's labels is unmistakable. The labels are of nearly the same dimensions; the paper and ink are respectively of the same colors. The prominent words in each are those already mentioned in discussing the questions in respect to the trade-mark — "Aromatic Schiedam Schnapps" — and the general appearance of the defendants' labels is such that a large majority of persons would be liable to mistake them for the plaintiff's labels.

In *Falkinburg v. Lucy*, 35 Cal. 52, it is said that a label is not entitled to protection as a trade-mark; and on the authority of that case, as we understand the plaintiff's counsel, the preliminary injunction in each of these cases was dissolved. A label is not a trade-mark, as recognized at common law, though it may in fact contain no words, figures, etc., except those which constitute the trade-mark. A person may adopt a label of given materials, size, color, etc., and may attach the same to his goods, or the wrappers,

cases, etc., in which they are packed, although another person has previously adopted a label of the same materials, dimensions and color, and used them in the same manner. While this right is conceded, in its exercise there is no necessity or propriety in adopting a label already in use by another. But labels, like trade-marks, may be adopted and used by a manufacturer or seller of goods to distinguish his goods from those of others; and when another person uses the same label or a colorable imitation thereof, it produces the same result as would a copy or colorable imitation of a trade-mark — that is to say, it is a false representation that the goods to which it is attached were manufactured or sold by the person whose label was copied or imitated, and purchasers are deceived and are liable to be defrauded. On principle, a person is as fully entitled to be protected in the use of his label as his trade-mark, and the authorities fully sustain this position. See *Amoskeag v. Spear*, 2 Sand. S. C. 599; *Stokes v. Landgraff*, 17 Barb. 608; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Coffeen v. Brunton*, 4 McLean, 516; *Williams v. Johnson*, 2 Bos. 1; *Croft v. Day*, 7 Beav. 84; *Upton*, 144. The decision in *Falkinburg v. Lucy*, *supra*, is that an entire label will not be protected at common law as a *trade-mark*; but, while it may be conceded that a label is not, strictly speaking, a trade-mark, the authorities, in our opinion, leave no doubt that the law does and should protect a party against the use or colorable imitation of his label by another. The imitation by the defendants of the labels attached by Wolfe to his bottles and the wrappers, and of the stamp upon his boxes or cases, is very apparent and well calculated to deceive purchasers; and the plaintiffs are entitled to an injunction to protect them from a further violation of their rights in those respects.

Order in each case dissolving the injunction is reversed, and the cause remanded with directions to modify the injunction so as to restrain the defendants from affixing, stamping, or attaching, or causing to be affixed, stamped or attached to or upon the bottles, wrappers or boxes in which is contained or packed the spirituous liquor manufactured, compounded, sold or offered for sale by them, the name or word "Wolfe," or "Wolf," or "Von Wolf," or "Van Wolf," or any colorable imitation of the name or word "Wolfe," or the labels or stamps which are attached to or stamped on the plaintiffs' bottles, wrappers or boxes, or any colorable imitation of them or either of them.

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THE OAKLAND COTTON MANUFACTURING COMPANY v. JENNINGS,
appellant.

(46 Cal. 175.)

Ship and shipping — liability of owner for contracts of master.

If the registered owner of a vessel appoints her master, with an agreement that the master is to have the entire control of the vessel, and victual and man her, and make contracts of affreightment, and divide the gross earnings with the owner, the owner is liable on contracts of affreightment made by the master with shippers who have no notice of the arrangement between the master and owner.

ACTION to recover damages for breach of a contract of affreightment. The plaintiff recovered judgment in the court below, and defendant appealed.

McAllister & Bergin, for appellant.

Botts & Wise, for respondent.

CROCKETT, J. The defendant being the owner of the American schooner *Greenfield*, caused her to be duly enrolled at the port of San Francisco, with one Enos as master. Subsequently he appointed Horton as master in place of Enos; but whether the change of masters was reported at the custom-house and noted or recorded, does not appear. Some time after Horton took command of the schooner the defendant entered into an agreement with him to the effect that Horton was to have the entire control and management of her; was to make whatever contracts of affreightment he saw fit; to employ her in any business he desired, within the inland waters of the State; to victual, man, and navigate her at his own expense, and to collect all her earnings; and to pay to the defendant one-third of her gross earnings, at the end of each month, or as often as a settlement was had between them — the defendant to keep the schooner seaworthy and in repair. Subsequently Horton entered into an agreement with one Finney, to the effect that the schooner was to be run for their joint benefit, under the contract with the defendant, and thereafter she was controlled and managed by the two jointly.

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The plaintiff contracted with Finney, acting on behalf of himself and Horton, to transport certain machinery, on the schooner, from San Francisco to Clinton, on the opposite side of the bay. But owing to negligent stowage, the schooner capsized during the voyage, and the machinery was partially lost, and the remainder damaged. The action is to recover damages for a breach of the contract of affreightment. On these facts, the defendant insists that he is not liable, for the reason that the schooner was not under his control or management, or navigated by his servant or agents, but by Horton & Finney, under the contract, they having the exclusive control and possession of her, with a right to make such contracts of affreightment as they saw proper; that Horton was in no sense the agent of the owner, with authority to bind him in maritime contracts, without his consent. On the other hand, the plaintiff claims that, by the maritime law, the master appointed by the owner is his agent to make contracts of affreightment, and that no secret agreement between the master and owner, of which the shipper had no notice, can exempt the owner from liability.

It appears to be well settled, that if a vessel be chartered in the usual manner, either for a particular voyage or for a period of time, the charterer having the authority to appoint the master, and undertaking to victual, man, and navigate her at his own expense, *he* will be deemed the owner *pro hac vice*, and the general owner will not be personally liable for supplies, or under contracts of affreightment. This proceeds upon the ground, that as the charterer appoints the master and has the exclusive control of the vessel, the master is *his* agent and not the agent of the general owner, who does not, therefore, hold himself out to the world as the principal for whom the master is authorized to act. In respect to a contract of affreightment, the general owner in such a case would not be liable, for the further reason that, inasmuch as the vessel was not navigated by him, or at his expense, or by his agents or servants, or for his benefit, he was not a common carrier, and was, therefore, not amenable as such. I do not understand the counsel for the plaintiff to controvert these propositions; but, at all events, they are abundantly supported by authority in this country and in England. It is equally clear that if the owner let out to charter the hold of the vessel, appointing his own master, and sailing her at his expense, he will be responsible on contracts of affreightment made by the master with the shippers, having no notice of the

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charter party. *Sandemann v. Scurr*, L. R., 2 Q. B. 86; *In re St. Cloud*, B. & L. R. 15. In the first of these cases, COCKBURN, C. J., bases his conclusion on the ground "that the plaintiffs having delivered their goods to be carried, in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master, to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carrying of the goods. We think that so long as the relation of owner and master continues, the latter as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well-known principle that where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has, by law, authority to sign bills of lading on behalf of his owners.

"A person shipping goods on board of a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owner in signing bills of lading. It may be that as between the owner, the master and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But in our judgment this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owners by signing bills of lading attaches by virtue of his office. We think that until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made."

This reasoning commends itself strongly to our judgment, and appears to be unanswerable. In the case at bar, the master was appointed by the defendant, who was the registered owner; and whatever may have been the secret understanding between them in respect to the management, employment and sailing of the vessel, or the appropriation of the earnings, persons dealing with the master in ignorance of this understanding, were warranted, in the

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language of Chief Justice COCKBURN, "in assuming that the master was acting by virtue of his ordinary authority and therefore acting for his owners in signing bills of lading." When Horton was appointed and entered upon his duties as master, the law conferred upon him authority to bind the owner in contracts of affreightment. By the act of appointing him, the defendant notified the public that Horton was his agent for this purpose. After thus openly proclaiming the agency, he is not at liberty secretly to revoke it while it ostensibly continues, in so far as persons are affected by it who dealt with the master within the scope of the agency in ignorance of the revocation. It is a familiar principle governing all agencies that so long as the principal permits the agency ostensibly to continue, even though it has been secretly revoked, the principal is bound by the acts of his apparent agent within the scope of the agency, in respect to persons dealing with the agent without notice of the revocation. In Story's Agency, section 470, it is said that "the revocation, as between the principal and agent, takes effect from the time *when* the revocation is made known to the agent, and as to third parties, when it is made known to them and not before. Until, therefore, the revocation is so made known it is inoperative. If known to the agent, as against his principal, his rights are gone, but as to third persons who are ignorant of the revocation, his acts bind both himself and his principal." It must be conceded, I think, on all sides, that by appointing the master, the owner, by a notorious act, constitutes him his agent to enter into contracts of affreightment, and if he can secretly revoke the agency, so as to affect third persons who are ignorant of the revocation, without revoking the appointment of the master, it must be because agencies of this description stand upon a different footing from other agencies and are excepted from the operation of the general rule. But there is no sound reason for the exception. On the contrary, considerations of public policy and fair dealing appear to me to require a strict application of the rule to this class of agencies. Otherwise the general owner who appoints the master and permits him, under the appointment, to continue in command of the vessel, thereby inviting the public to deal with him as the agent of the owner, may wholly escape responsibility for the acts of his ostensible and accredited agent by entering into a secret agreement with the master, of the terms of which the public are not informed. If he could thus escape responsibility

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it would impose upon shippers the necessity of inquiring, at their peril, not only who was the owner, and by whom the master was appointed, but also what secret understanding or agreement existed between them in respect to the management and sailing of the vessel. In my opinion the interests of commerce demand that this onerous duty should not be imposed upon shippers, and that the owners of vessels navigated by masters appointed by them should be subject to the responsibilities which usually pertain to the relation of owner and master in dealing with those who are ignorant that those relations are different from what they *prima facie* are. I am aware that there is apparently a considerable conflict in the authorities on this point, but, in my opinion, those which hold the views above stated are supported by the better reasoning.

Judgment affirmed.

OGBURN, appellant, v. CONNOR.

(46 Cal. 348.)

Surface water — inferior heritor cannot obstruct — Easement.

Defendant, owning lands adjoining and below unoccupied public lands of the United States, built an embankment along his lands to obstruct the flow of the surface water from the adjoining lands. Plaintiff afterward purchased said public lands, and brought this action to recover for damages done to his land and crops by means of said embankment. *Held*, (1) that plaintiff had a natural easement to have the surface water from his lands flow off upon the lands below, and that defendant was liable for injuries occasioned by obstructing such flow; (2) that defendant could gain no prescriptive right against the United States, and that, therefore, the plaintiff was not prejudiced by the fact that the embankment was built before he purchased the land.

ACTION for damages. The opinion states the facts. The defendant recovered judgment below, and plaintiff appealed.

Frost & Bush and Catlin & McFarland, for appellant.

J. C. Ball and Armstrong & Hinkson, for respondent.

BELCHER, J. The plaintiff was the owner of a farm adjoining and lying directly north of a farm owned by the defendant. A

portion of the defendant's land was lower than the land of the plaintiff, and had extending through it a natural depression. There was no stream or water-course upon the plaintiff's land; but the surface water, falling upon it in times of heavy rains, and flowing upon it from other adjoining and still higher lands, was accustomed, before the flow was obstructed by the defendant, to pass off through the depression named, over the land of the defendant, into a large natural water-course known as Willow Slough.

In 1863, and while the plaintiff's land was unoccupied public land of the United States, the defendant built, along the north line of his land, a ditch fence for the protection of his land and growing crops. This ditch fence consisted of a ditch and embankment, with some rails or boards on top of the embankment, and was sufficient to partially obstruct the water which fell or collected upon the plaintiff's land, from flowing over the land of the defendant as it had been before that time accustomed to do. In 1869 the defendant strengthened and enlarged the embankment so as to form a more complete barrier to the passage of the water referred to. In December, 1871, very heavy and copious rains fell, and a large quantity of water therefrom collected upon the land of the plaintiff, but its passage off from the land was obstructed by the embankment erected by the defendant, and thereby a large part of the plaintiff's land was inundated and his growing crop of wheat injured to the amount of \$500.

This action was brought to recover for this injury; but the court below, being of the opinion that the defendant might lawfully protect his land by an embankment or other means, against the surface water flowing from the land of the plaintiff, and that the injury was therefore *damnum absque injuria*, rendered judgment for the defendant.

The question presented for decision is important, and not free from difficulty. In Massachusetts the courts have steadily adhered to the rule followed by the court below. In that State it is said that "the obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." *Gannon v. Horgadon*, 10 Allen, 110; *Parks v. Newburyport*, 10 Graff, 28; *Ashley v. Wolcott*, 11 Cush. 192.

The rule has not, however, been generally followed in the other

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States, except in so far as it applies to town or city lots. *Martin v. Riddle*, 26 Penn. St. 415; *Rauffman v. Griesemer*, 26 id. 407; *Martin v. Jett*, 12 La. 502; *Lattimore v. Davis*, 14 id. 161; *Delahousaye v. Judice*, 13 La. An. 587; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181; *Beard v. Murphy*, 37 Vt. St. 99; *Gillham v. Madison R. R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 id. 158; *Billows v. Sackett*, 15 Barb. 102.

The prevailing doctrine appears to be that when two fields are adjacent and one is lower than the other, the owner of the upper field has a natural easement to have the water that falls upon his land flow off from the same upon the field below, which is charged with a corresponding servitude.

In *Martin v. Riddle*, the court said: "When two fields adjoin and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbors' fields by several channels, and thus increase the rush upon the lower fields."

In *Gillham v. The Madison County R. R. Co.*, the supreme court of Illinois said that the doctrine of *Martin v. Riddle* was the doctrine of the civil law, and has found favor in almost all the common-law courts of this country and of England.

In *Butler v. Peck*, the supreme court of Ohio said: "The principle seems to be established and indisputable that when two parcels of land belonging to different owners lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a servitude to the upper to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude; or in other words, more familiar to students of the common law, the owner of the upper parcel of land has a natural easement in the lower parcel to the extent of the natural flow of water from the upper parcel to and upon the lower."

As the result of the cases upon the subject, Mr. Washburn, in

his excellent work on Easements and Servitudes, states the rule thus: "It may be stated as a general principle that when the situation of two adjoining fields is such that the water falling or collected by melting snows and the like upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land, if desired by the owner of the upper field. But the latter cannot, by artificial trenches or otherwise, cause the natural mode of its being discharged to be changed, to the injury of the lower field, as by conducting it by new channels in unusual quantities on the particular parts of the lower field." (2d ed., p. 427.)

Substantially the same question was before this court, in *Castro v. Bailey*, decided at the October term, 1869 (not reported), and the judgment, which was for the plaintiff in the court below, was affirmed here.

We are satisfied that the rule generally prevailing in this country is the better rule, and that it, and not the rule which obtains in Massachusetts, should have been followed by the court below.

But it is said by counsel for respondent that the answer alleged that the plaintiff, by means of ditches constructed by him, had concentrated the water upon his own land, and carried the same by new channels upon the defendant's land; that in support of the judgment these facts will be presumed to have been found in favor of the defendant, and the plaintiff, therefore, was not entitled to recover. The obvious answer to this position is that the court negatived this allegation of the answer by finding that there was no water-course or stream upon the plaintiff's land, but that all the water falling thereon was accustomed to descend upon the land of the defendant by reason of the natural depression of the soil.

It is further urged that the plaintiff ought not to be permitted to recover, because the defendant constructed his embankment before the plaintiff purchased his land of the government, or had settled thereon.

The argument is not sound. While the upper portion belonged to the government the defendant could gain no prescriptive right to obstruct the natural flow of the water therefrom. When the plaintiff purchased he acquired all the rights which the government had in the land at the time of its sale; one of these rights, as we have seen, was the right to have all surface water collected

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upon it flow off freely and without obstruction upon adjoining lower lands.

The point is made that the "additional findings made at request of plaintiff," cannot be considered; but we think it not well taken. The case was tried and submitted to the court, and afterward, in vacation, the findings and judgment were filed with the clerk. Ten days subsequently the "additional findings" were filed. The statute authorized exceptions for defective or insufficient findings, and we must presume such exceptions were filed and served. It is settled that when a cause is submitted in term, the findings and judgment may be filed in vacation. And when additional findings are called for they may be and ordinarily must be filed subsequent to the entry of judgment.

The judgment is reversed and cause remanded, with directions to the court below to enter judgment for the plaintiff upon the findings.

KING, appellant, v. HANEY.

(46 Cal. 500.)

Evidence, waiver of objection to.

If one party offers himself as a witness, and the other objects because the objector is the representative of a deceased person, and the court decides to take the evidence with leave to the other party to move to strike it out, the motion to strike out must be made when the direct examination is closed. By cross-examining the witness generally, the other party waives the motion to strike out.

THE action was ejectment, in which plaintiff had judgment. A new trial was granted on the application of the defendants, and the plaintiff appealed from the order.

The other facts are stated in the opinion.

Crane & Boyd, McCullough & Boyd, and E. A. Lawrence, for appellant. By waiting to make the motion to strike out King's testimony until after all the evidence was in, the defendants waived their right to have the testimony excluded. *Turner v. Tuolumne*

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Water Co., 25 Cal. 397; *Sharp v. Lumley*, 34 id. 612; *Ward v. Whitney*, 3 Sandf. 399; *Onondaga Ins. Co. v. Minard*, 2 N.Y. 98; *Rees v. Livingston*, 41 Penn. St. 113; *Hall v. Earnest*, 36 Barb. 585; *Laurent v. Vaughn*, 30 Vt. 90; 1 Greenl. Ev., § 421; *Moorhouse v. De Passou*, 19 Vesey, Jr., 432; *Harrison v. Courtauld*, 1 Russell & Mylne, 428.

William M. Pierson and *William H. Patterson*, for respondents.

BELCHER, J. The defendant Louderback claimed title to the premises in controversy, through a deed made to him by one Judson Baldwin, who, it was admitted, died July 19, 1863.

Upon the trial, the plaintiff King was called as a witness in his own behalf, and, having stated that he first became interested in the property in December, 1857, was asked whom he found on the property in possession at that time, if any one. Counsel for defendants then "objected to any testimony from Mr. King as to any transaction that occurred previous to 1863, on the ground that the defendant Louderback is the representative of a deceased person, one Judson Baldwin, who died in 1863, which fact he offered to prove, he being the person from whom defendants claim."

The court replied: "We will take the evidence now and the defendant may move to strike it out." No exception was taken to this ruling, and the witness then testified, without further objection, to transactions occurring both before and after 1863. At the close of his examination-in-chief no motion was made to strike out any portion of his testimony, but counsel proceeded to cross-examine the witness at length. When the testimony was all in on both sides, and the trial, which was protracted, was about to be concluded, counsel for defendants moved the court "to strike out all the evidence of plaintiff King, as to facts that transpired previous to the 19th of July, 1863," and the motion was denied. Judgment having then passed in favor of the plaintiff, the court below granted a new trial, upon the ground "that an error in law was committed at the trial by admitting James L. King, the plaintiff, while testifying as a witness in his own behalf in said case, to testify to the declarations and admissions of Judson Baldwin, deceased, in opposition to the objection and exception of defendants' counsel, said testimony being of facts occurring prior to the decease of said Judson Baldwin, and the defendant being a representative of said Judson."

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The correctness of this order is called in question by the appeal.

It was held in *Davis v. Davis*, 26 Cal. 23, that one of the parties in an action to recover the possession of land cannot make himself a witness in his own behalf on the trial of the action for the purpose of defeating the title of the adverse party to the land in dispute, if the adverse party is the grantee of a person no longer living, and the facts he offers himself to prove transpired before the death of his grantor.

Under this ruling King was an incompetent witness to testify to facts transpiring before the death of Baldwin, though the facts themselves were competent and relevant testimony. His disqualification was not unlike the disqualification of an interested witness under the old rules ; but under those rules it was necessary to make the objection to the competency of the witness as soon as an opportunity to do so was presented. If the interest of the witness appeared during his examination-in-chief, it was too late to take the objection after going into a cross-examination upon other matters. One had the election to admit an interested person to testify against him or not, and failing to take the objection at the proper time, he was presumed to have waived it forever. 1 Greenleaf on Ev., § 421.

In *Brooks v. Crosby*, 22 Cal. 42, a witness was called by the plaintiff, and during his examination-in-chief it appeared that he was interested in the action, but the defendants cross-examined him at length on other matters, and then moved to strike out his evidence on the ground of his interest. This motion was denied, and when the case was brought here it was said : "There is nothing in the point that the court erred in refusing to strike out the testimony of the witness Shear. His interest, if he had any, appeared during his direct examination, and the motion to strike out was not made until the defendants had cross-examined him. Of course, it was made too late, as the defendants could not, knowing the interest of the witness, take their chances of a cross-examination, and subsequently avail themselves of the objection to get rid of the evidence."

In Minnesota there is a statute under which a party to a contract is not permitted to testify when the other party is dead. But in *Levering v. Langley*, 8 Min. 107, the supreme court of that State said : "The defendant, Langley, was called and, under an objection from the plaintiff's counsel that the testimony was incompetent,

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irrelevant and immaterial, which was overruled, testified substantially to such an agreement between the parties at the time of the execution of the assignment of the lease. After this evidence had been thus elicited, the counsel for the plaintiff interposed the further objection to evidence of this agreement that Randall was now dead. The referee overruled the objection as having been made too late. In this decision, we think, he was clearly right. The plaintiff's counsel could waive his right to object to the evidence of his adversary, on the ground of the decease of the plaintiff's assignor, and we think he did so by delaying to assert it until after the witness had been allowed to testify, and more particularly so as he made objections specifically upon other grounds, which were directed to the admissibility of the testimony offered, and not to the competency of the witness by whom it was sought to be proved."

We think the motion to strike out in this case was made too late. It should have been made as soon as the direct examination was closed. By cross-examining the witness generally the defendants waived the objection, and the court properly overruled their motion.

There is nothing in the other specifications on which the motion for a new trial was made. It results that the order granting a new trial must be reversed, and it is so ordered.

Remittitur forthwith.

BUCKNALL, appellant, v. STORY.

(46 Cal. 589.)

Payment of money levied on void assessment — Recovery of money paid on void assessment.

If property is assessed for widening a street, not to the true owner, but to a stranger, and the owner pays the money to prevent a sale by the tax collector, he will be deemed to have known when he paid it that a sale by the tax collector would be a nullity, and would not invest the purchaser with even a colorable title, and in such case the payment will be deemed voluntary.

When an assessment is void upon its face, because made to one who does not own the property, and the true owner, with a knowledge of the fact, but under a misapprehension of or in ignorance of the law, pays the tax under protest, and to avoid a threatened sale of the property by the tax collector, it is to be deemed a voluntary payment, and he cannot recover back the money in a suit against the tax collector

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IN 1864 (Laws 1863-4, p. 347), the legislature passed an act empowering the board of supervisors of the city and county of San Francisco to lay out, open, extend, or widen any street in said city, and to determine what property would be benefited by the proposed improvement and ought to bear the expense thereof, and to assess the expense upon the property declared to be benefited. Under this act the board of supervisors determined to widen Kearny street, and commenced proceedings to do so on the 19th day of September, 1864. The plaintiffs were the owners of a lot at the northeast corner of Kearny and Washington streets, fronting 137 feet and six inches on Kearny street, and 275 feet on Washington street, and on this lot was assessed, to help pay the expense of the said improvement, the sum of \$18,193.10. The assessment was made to Eugene L. Sullivan. The defendant was tax collector of said city and county, and as such it was his duty to collect the tax, and on the 21st day of October, 1867, the tax became delinquent, and he levied on the lot and added five per cent to the amount of the assessment, making a total of \$19,103.25. On the 25th day of November, 1867, he advertised that on the 18th day of December, 1867, he would sell the property, or so much thereof as might be necessary to pay the tax. On the 16th day of December, 1867, the plaintiffs commenced an action to enjoin this sale, and the case is the one referred to in the opinion as reported in 36 Cal. 67. The court made an order for the defendant to show cause on the 21st day of December, 1867, why an injunction should not be granted, and the defendant postponed the sale until the decision of the court on the injunction. On the 27th day of December, 1867, the court denied the injunction, and on the same day the defendant offered the property for sale as advertised, but before a sale, and to prevent one, the plaintiffs paid the tax, at the same time telling the defendant that they paid it under protest, and to prevent title to their property from being clouded by the sale. After the final determination of the injunction case reported in 36 Cal., and in 1869, this action was commenced to recover the money thus paid. The work of widening Kearny street was accomplished, but the defendant retained the money thus paid him, and the requisite amount to make up the sum to enable the city to go on with the work was transferred from the general fund. The facts were fully stated in the complaint, and the defendant demurred to the same because it did not state facts sufficient to constitute a cause of action. The do-

murrer was sustained, and the plaintiffs declining to amend, final judgment was rendered against them. From this judgment the plaintiffs appealed.

In the original proceedings in relation to widening the street several appeals were taken, but the plaintiffs here did not appeal. See 82 Cal. 499-569.

The other facts are stated in the opinion.

McCullough & Boyd and *W. W. Crane*, for appellants. The assessment was invalid. It was not made to the true owners or occupants, nor to an unknown owner or occupant. "Whenever an attempt is made to charge or divest the estate of a citizen by statutory modes, the proceedings must strictly follow the steps of the statute, or the attempt will fail. * * * This rule is universal, and is unaffected by any change in the purpose for which the attempt is made." *Smith v. Davis*, 30 Cal. 537. "That the provisions of this and like statutes must be strictly observed in order to charge the property holder, is too well settled to need constant repetition. The rule is universal, and applies to all statutes upon the subject of taxation, whether for local improvement or public revenue. No person can be held liable for a tax of any kind except upon the production of an assessment against him, made in the manner provided by the taxing power." *Taylor v. Donner*, 31 Cal. 482. "The power conferred must be executed precisely as it is given, and any departure will vitiate the whole proceeding." *Curran v. Shattuck*, 24 Cal. 432. "This principle is so well settled everywhere that it is unnecessary to cite authorities." *Smith v. Cofran*, 34 Cal. 316. The assessment in this case was not made to the owner, nor to an occupant, nor to an unknown owner or occupant. Under the facts stated, the law quoted, and the decisions cited, the assessment must fall, unless "the general doctrine that no person is to be held liable for a tax except upon the production of an assessment against him, made in the manner required by law, is to be abandoned as fallacious." *People v. Sneath*, 28 Cal. 6, 15; *Moss v. Shear*, 25 id. 45, 46; *Smith v. Davis*, 30 id. 536; *Taylor v. Donner*, 31 id. 480; *Guerrin v. Reese*, 33 id. 292; *Smith v. Cofran*, 34 id. 311; *Himmelman v. Steiner*, 38 id. 180.

Notwithstanding the assessment was absolutely void, yet the defendant, as tax collector, had made a levy upon the land, and it was in such duress, in contemplation of law, that the plaintiff was

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justified in paying the illegal claim under protest, and then bringing this form of action to recover it back. The act of 1864 (p. 353, § 15) required that after the assessment roll was made out and the mayor's warrant attached to it, "the same (the assessment) shall thereupon be collected in the manner then prescribed by law for the collection of general taxes in said city and county, and shall, in like manner, be a lien upon the respective tracts and parcels of land, corporations, and companies, as aforesaid." This manner was for the tax collector to make a levy upon the lands, and then, after advertisement, to proceed and sell them. Stats. 1857, p. 331. In the case at bar the defendant was upon the point of making the sale when the money was paid under protest.

The question is not, whether we mistook the law, but whether there was such compulsion as rendered the payment involuntary. And it is of no moment that an injunction could not be granted to restrain the sale, because the very ground why equity will not enjoin in such a case as this is, because the aggrieved party has his remedy at law; and this remedy is twofold — either to let his property go to sale, and resist an action for the possession, or to pay the assessment under protest, and bring an action to recover it back; and such we understand to be the well-settled law of this State. *Hays v. Hogan*, 5 Cal. 241; *Falkner v. Hunt*, 16 id. 167; *Guy v. Washburn*, 23 id. 111.

We might, stopping here, admit even that these three decisions cannot be considered as sound law, and yet invoke the rule of *stare decisis* as conclusive of our right, as we were justified in acting upon the faith of those decisions, and in looking to them as guides in the very peculiar position in which we were placed. But we claim that those cases contain a true exposition of the law upon the subject. *Amesbury Woolen and Cotton Manufacturing Co. v. Amesbury*, 17 Mass. 460; *Wilson v. Mayor of N. Y.*, 1 Abb. 26; *Preston v. Boston*, 12 Pick. 13; *Boston and Sandwich Glass Co. v. City of Boston*, 4 Metc. 187; *Sumner v. First Parish in Dorchester*, 4 Pick. 361; *Ingles v. Bosworth*, 5 id. 498; *Torrey v. Milbury*, 21 id. 64; *Dow v. Sudbury*, 5 Metc. 73; *Joyner v. Egremont*, 3 Cush. 567; *Atwater v. Woodbridge*, 6 Conn. 223; *Adams v. Litchfield*, 10 id. 126; *Lima Township v. Jenks*, 20 Ind. 301; *Harvey v. Town of Olney*, 42 Ill. 336; *Allentown v. Saeger*, 20 Penn. 421; Blackwell on Tax Titles, 485.

A. Campbell, for respondent.

CROCKETT, J. This is an action to recover a sum of money, paid under protest by the plaintiffs to the defendant, as a tax collector, for an assessment on their land for the widening of Kearny street, in San Francisco; the property in question being situated within the district defined by the board of supervisors as that which would be benefited by the improvement. The assessment is alleged to have been illegal, on the ground that in the report of the commissioners appointed to make the valuations and assess the benefits, the plaintiffs' land was assessed as the property of E. L. Sullivan, who had no interest therein, and that the plaintiffs were not made parties to the proceeding. It is claimed that for these reasons the assessment was void, and that neither the plaintiffs nor their land were bound by the proceedings. On the other side, it is contended that if it be conceded that the assessment was void for the reasons above stated, the payment having been made by the plaintiffs with a knowledge of all the facts, it was a voluntary payment, and the action cannot be maintained. This branch of the case will be first considered.

In *Hays v. Hogan*, 5 Cal. 241, the trustees of Oakland had levied an excessive and illegal tax, which was therefore void. If the tax had been legal, it could only have been collected by suit, and not by a summary sale of the property by the tax collector. That officer, however, proceeded to sell the property for the collection of the tax, against the protest of the owner, who became the purchaser at the sale in order to prevent a cloud upon the title, and then brought an action against the tax collector to recover back the money. On these facts this court said: "The right of the plaintiff to recover, under these circumstances, is undoubted. He protested against the sale, purchased in order to protect his property from a clouded title, and made the payment under protest, and in a few days afterward commenced his suit for the recovery of the money." No authorities are cited in the opinion.

In *McMillan v. Richards*, 9 Cal. 417, the court says: "The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. * * * It is notice only to the party receiving the payment that if the demand is illegal in whole or in any specified particulars he may be

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subjected to an action for the recovery back of the amount to which objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion." The court quotes with approbation the following extract from the opinion of SANDFORD, J., in *Fleetwood v. City of New York*, 2 Sandford's Superior Ct. R. 481: "When a party pays under duress of his goods, a protest may become important as evidence that the payment was the effect of the duress, and not an admission of the right enforced by the adverse party. But where there is no legal compulsion a party yielding to the assertion of an adverse claim cannot detract from the force of his concession by saying I object or I protest at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim.'

In *Falkner v. Hunt*, 16 Cal. 167, the plaintiff paid under protest a tax assessed on certain mortgages, and sued to recover back the money, on the ground that the tax was paid under compulsion and was illegal. On this point the court merely says: "If the money was paid under protest, and was not justly due, it may be recovered back in an action of this sort, citing *Hays v. Hogan* and *McMillan v. Richards*.

In *Guy v. Washburne*, 23 Cal. 113, the court says: "The right of a party who has paid money not justly due, to a tax collector, under protest, to recover it back by action, has been sustained by this court, in cases of both real and personal property" (citing *Hays v. Hogan* and *Falkner v. Hunt*). "We are not disposed to disturb those decisions upon this point." These decisions, except *McMillan v. Richards*, place the doctrine upon the somewhat broad ground that if the tax be illegal, and is paid under protest, it may be recovered back. They appear to assume that the protest is sufficient evidence of compulsion to relieve the transaction from the character of a voluntary payment. But we think the rule is more correctly stated in *Brummagim v. Tillinghast*, 18 Cal. 271: "The illegality of the demand paid constitutes, of itself, no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. If he voluntarily pay an illegal demand, knowing it to be illegal, he is, of course, entitled to no consideration; and if he voluntarily pay such

demand in ignorance or misapprehension of the law respecting its validity, he is in no better position; for it would be against the highest policy to permit transactions to be opened upon grounds of this character. * * * What shall constitute the compulsion or coercion which the law will recognize as sufficient to render payments involuntary, may often be a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." The court quotes, with approval, the opinion in *Forbes v. Appleton*, 5 Cush. 117, in which it is said: "The principal is a very familiar and a very salutary one, that, where a person, with full knowledge of all the circumstances, pays money voluntarily under a claim of right, he shall not afterward recover back the money so paid. To avoid the application of the rule in the present case, it must appear that the plaintiff was compelled, by duress of his person or goods, to pay the same. In general, the cases which have been treated as exceptions, are cases where the possession of the property upon which the lien was claimed was already in the party demanding the money, or cases in which the party had no other means to save himself from imprisonment or his property from sale on execution or warrant of distress, but by paying the money demanded." In support of these views the court also quotes from the case of *Mays v. Cincinnati*, 1 Ohio R. 268, in which it is said that "a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it."

Tested by these rules, and assuming that the assessment was void, the payment made by the plaintiffs must be deemed to have been voluntary. It is not claimed that they were not fully informed of all the facts; and they must be held to have known the law applicable to the facts. If the assessment was void, it created no lien on their property, and the purchaser at the tax collector's sale would have acquired no title, nor even a color of title, which would have operated as a cloud upon the true title. In another action between these parties, the plaintiffs sought to enjoin the defendant

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from proceeding with the sale, on the ground that there had been illegally added to the assessment five per cent on account of delinquency, and that a sale by the tax collector for the whole amount would be illegal, and would cloud the plaintiffs' title. This court held on appeal, that the sale would be void on the face of the proceeding, and would not create a cloud upon the title; and further, that the tax collector's deed would not be *prima facie* evidence of title, and, therefore, would impose no cloud. The injunction was, therefore, refused. (36 Cal. 67.) If the purchaser at the sale had sought to disturb the plaintiffs in the possession or enjoyment of the property, neither the proceedings relating to the assessment or the tax collector's deed would have been *prima facie* evidence of title, provided the plaintiffs were not parties to or bound by the proceeding. In order to make out a *prima facie* case he must have shown that on the face of the proceedings the plaintiffs' title became subject to the assessment, and passed by the sale. But if the plaintiffs' theory be correct it was impossible to do this, for the reason that on the face of the proceedings it appeared the court had acquired no jurisdiction to deal with their rights. They must, therefore, be held to have known, when they paid the money, that a sale by the tax collector would be a nullity, and would not invest the purchaser with even a colorable title, as against them. There was, therefore, no legal duress or coercion; and the payment was voluntary.

On the other hand, if they were parties to and bound by the proceedings, they cannot attack them for mere error, in a collateral action. In respect to errors in the proceedings, their remedy was by appeal.

Judgment affirmed.

Mr. Chief Justice WALLACE did not express an opinion.

Mr. Justice BELCHER dissented.

CASES
IN THE
SUPREME COURT
OF
OHIO.

BOATMAN'S FIRE AND MARINE INSURANCE COMPANY, plaintiff
in error, v. PARKER.

(23 Ohio St. 85.)

Insurance — construction of policy — explosion.

A policy of insurance against loss or damage by fire contained a condition that the company would not be liable "for damage to property by lightning, aside from fire, * * * nor for damages occasioned by the explosion of a steam-boiler, nor for damages by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances." *Held*, that the company is not exempted by this clause from liability for damage by fire resulting from an explosion of gas, but is thereby exempted from damage occasioned by the explosive force of the gas without communicating fire to the insured property.

ERROR to the district court of Cuyhoga county. Action on a policy of insurance against loss by fire.

On the 1st day of August, 1867, the insurance company, for a premium of \$141.50, issued its policy to Marcus O. Parker, insuring him for one year in the sum of \$2,075, upon specified portions of an oil-refinery and property therein contained, located in the city of Cleveland, against loss or damage by fire. Among the conditions attached to the policy, and made part thereof, the ninth was as follows :

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"9. This company will not be liable for damage to property by lightning, aside from fire, nor for any loss or damage by fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, *nor for damage occasioned by the explosion of a steam-boiler, nor for damage resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances*, nor for damage occasioned by the use of camphene or burning-fluid, coal-oil, petroleum, or any of their products, by whatever name designated, *unless otherwise expressly provided*.

On the 28th of July, 1868, a portion of the property was destroyed by fire. Immediately the insured gave notice of the loss to the company, and soon thereafter furnished to the company, as required by the fifteenth condition of the policy, the preliminary proofs of the loss. In giving an account of the origin of the fire, as required, he stated, "that after a full and thorough investigation of the cause and origin of said fire, affiant has learned the facts to be as follows: That owing to the peculiar state of the atmosphere at the time of the fire, the heavy gas escaping from the oil (which was in process of distillation at the time) settled down near the ground, and came in contact with the fires under the stills and took fire, and the fire ran back some sixty-five feet to the receiving-house and ignited the gas and oil in the receiving-house, which caused an explosion and threw the ignited oil over the works, and they were consumed as aforesaid. That previous to the igniting of said oil by said stills, there had been no fire about the receiving-house; that the explosion in the receiving-house was caused by the fire coming in contact with the gas and oil of the receiving-house, as before stated; and the fire was not caused by the explosion."

The company declined to pay the loss, on the ground that the proofs showed the loss was occasioned by an explosion of gas, and that the ninth condition of the policy exempted the company from liability thereon. Thereupon the insured brought his action on the policy.

It was averred in the petition that the loss was occasioned by fire. By way of defense, the company set up the ninth condition of the policy, and averred that the loss was occasioned by fire resulting from the explosion of gas.

The case was tried to a jury, and a verdict was rendered in favor of the insured.

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The evidence tended to show that the loss occurred substantially as stated in the amended preliminary proofs. Some of the evidence was "admitted, subject to exceptions," but no exception was, in fact, taken to any ruling of the court thereon.

The court charged the jury that the ninth condition of the policy exempted the company from the loss, if it was occasioned by fire resulting from an explosion of gas; but that, as the company admitted in its answer that the loss was occasioned by fire, the burden of proof was upon it to prove that it resulted from an explosion of gas. To the last part of this charge the company excepted.

A motion for a new trial, on the ground that the verdict was against the law and the evidence, was overruled, and exceptions were taken. Judgment was rendered on the verdict.

H. S. Sherman, George S. Kain and Moulton & Johnson, for plaintiff in error.

Canfield & Caskey, for defendant in error.

DAY, J. The determination of the controversy, in this case, depends chiefly upon the proper construction to be given to the ninth condition of the policy. In the body of the policy, the plaintiff below was insured against loss or damage by fire on specified articles of property constituting an oil refinery. An engine, and crude oil in process of refining, were included among the items insured. During the process of refining an explosive gas escapes from the oil.

The object of inserting the ninth condition in the policy was to exempt the company from liability for certain losses insured against in the body of the policy. The condition is framed upon the evident theory that the company would be liable under the policy, not only for the loss of the insured property by fire, but for any damage it might sustain by reason of certain destructive forces proximately connected with fire, although the property should not be burned. Whether the theory is well founded or not, it equally aids us in arriving at the intention and meaning of the language employed.

In regard to lightning, the two kinds of damage that may be occasioned thereby are recognized; and the exemption from liability is confined to that arising only from the destructive force where no fire ensues. Both kinds of damage that may arise from the explo-

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sion of a steam boiler are recognized; and the exemption is made to apply to both the damages occasioned by the explosive force, and that by fire resulting from the explosion.

But the difficulty arises in determining whether both kinds of damage are embraced in the exemption from liability when caused by the explosion of "gunpowder, gas, or other explosive substance;" or, if not both, which one is included. The clause in question provides that the company will not be liable "for damages occasioned by the explosion of a steam-boiler, nor for damage resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances." The structure of the clause is unfortunate, if it was intended to include both kinds of damages in the exemption. If that was the purpose, the more natural expression would have been, that the company will not be liable "for damages occasioned by the explosion of a steam-boiler, or explosions caused by gunpowder, gas," etc., "nor for damage by fire resulting from such explosions." Indeed, the same end would perhaps have been attained, had the exemption in regard to fire resulting from an explosion been omitted. It is contended that the case of the *Insurance Co. v. Foote*, 22 Ohio St. 340, decided at the present term, warrants us in holding in this case, that the exemption from damage occasioned by the explosion of gas would have embraced that of fire resulting from the explosion. But the insertion of those words in the clause under consideration distinguishes this case from that; for, in the relation in which they stand in the sentence, they not only evince the idea of liability for two kinds of damages caused by explosions, but are applied to one kind of explosions only, thereby excluding their application to the other explosions mentioned; or that, as to explosions by gunpowder or gas, the exemption applies to but one of the kinds of damage that may result therefrom. It can hardly be supposed that it was the purpose to exempt the company from liability for fire resulting from the explosion of gunpowder or gas, while it remained liable for damage occasioned by an explosion where fire does not ensue. The more reasonable presumption would seem to be, that as gunpowder and gas, when ignited, like lightning or steam, are destructive forces, the purpose was to exempt the company from the kind of damage resulting from the explosive force merely. If this be not the true construction, as to some of the property, the policy was a practical nullity; for it appears that petroleum oil, in process of refining, could never be

destroyed by fire without being ignited by an explosion of the gas enveloping it while undergoing that process.

In *Hare v. Horton*, 5 B. & Ad. 715, upon a mortgage of dwelling-houses, foundries, and other premises, together with all fixtures in the dwelling-houses — applying the maxim, *expressio unius exclusio alterius* — it was held, that although, without these words, the fixtures in the foundries would have passed, yet by them, the fixtures intended to pass were confined to those in the dwelling-houses. So, upon the same principle, in this case, although damage by fire might have been included in a general exemption from liability for damage occasioned by the explosion of a steam-boiler, or of gunpowder or gas, yet the exemption for such damage is expressly confined to that resulting from the explosion of a steam-boiler, and therefore excludes the application of the same exemption from loss by fire resulting from explosions caused by gunpowder or gas.

This is a fair and rational construction of the clause in question, and we have no reason to suppose it does not accord with the understanding of the parties. If, however, the company which framed the policy intended this clause — hid away in one of its numerous conditions — to be interpreted differently, it is but reasonable that they should be held to the employment of language free from obscurity and doubt; and the company has no just reason to complain if a reasonable construction of the language it has used is adopted, though it be not the most favorable to the company. *Insurance Co. v. Slaughter*, 12 Wal. 404; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106.

This disposes of the case; for the whole defense was based on a different construction of the policy, and all the questions made in the case are resolved by the construction we have given to that instrument. Indeed, the plaintiff below was entitled to judgment upon the pleadings; for the loss by fire was admitted by the answer, and the defense interposed thereby was insufficient in law. The judgments of the courts below must, therefore, be affirmed.

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BOARD OF EDUCATION OF THE CITY OF CINCINNATI, plaintiff in error, v. MINOR *et al.*

(23 Ohio St. 211.)

Constitutional law — bible in the public schools.

The constitution of the State does not enjoin or require religious instruction, or the reading of religious books, in the public schools of the State. The legislature having placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what books shall be read therein.

ACTION by the defendants in error, tax payers of the city of Cincinnati, to enjoin the plaintiffs in error, the board of education and certain of its members and officers, from carrying into effect, or enforcing, two resolutions then lately adopted by the board. These resolutions are as follows:

“*Resolved*, That religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the common-school fund.

“*Resolved*, That so much of the regulations on the course of study and the text-books in the intermediate and district schools (page 213, annual report), as reads as follows: ‘The opening exercises in every department shall commence by reading a portion of the Bible by or under the direction of the teacher, and appropriate singing by the pupils,’ be repealed.”

The entire rule thus quoted from is in the following words: “The opening exercises in every department shall commence by reading a portion of the Bible, by or under the direction of the teacher, and appropriate singing by the pupils. The pupils of the common schools may read such version of the Sacred Scriptures as their parents or guardians may prefer, provided that such preference of any version, except the one now in use, be communicated by the parents and guardians to the principal teachers, and that no notes or marginal readings be allowed in the schools, or comments

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made by the teachers on the text of any version that is or may be introduced."

The plaintiffs below allege in their petition, that the rule last above quoted was adopted in 1852, and has ever since that time been in full force and effect, as one of the rules for the conduct of the schools of the city, and that the version of the Holy Bible generally used in said schools, and referred to in the rule above quoted as "the one now in use," is that published by the "American Bible Society," and commonly known as King James' version. They further say, "that the reading of the Holy Bible, without note or comment, has been one of the daily exercises of said schools from the time of their first establishment under the general school laws of Ohio, to wit, from about the year 1829 till now, and that instruction in the elemental truths and principles of religion has always been given in said schools, but no sectarian teaching, nor any interference with the rights of conscience, has at any time been permitted."

They further say, "that a large number of the text-books used in said schools contain selections and passages from the Holy Bible, and from other books and writings which inculcate religious truths; that this is especially true as to the readers in common use in said schools; * * * and that the enforcement of the rule proposed by said board of education will exclude from the schools large numbers of valuable text-books, which have been recently purchased by parents or guardians for the use of children attending said schools, in compliance with the requirements of said board of education."

They further say, "that a large majority of the children in said city who receive any education are educated in said schools, and of said children large numbers receive no religious instruction or knowledge of the Holy Bible, except that communicated as aforesaid in said schools, and that the enforcement of the resolutions first aforesaid will result in leaving such children without any religious instruction whatever. And the plaintiffs allege that such instruction is necessary and indispensable to fit said children to be good citizens of the State of Ohio and of the United States, and is required by the third article of the act passed by the congress of the United States, July 13, 1787, entitled 'an ordinance for the government of the territory of the United States northwest of the river Ohio,' to be forever encouraged."

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By their answer the defendants, among other things, say: * * *
“It is true that there are books other than the Bible now in use in the common schools of Cincinnati which contain passages and selections from the Bible, and from writings inculcating truths, which by many persons are designated as religious truths, but that such books are not religious books, and are not used for the purpose of conveying religious instruction; that these defendants believe it to be true that a number of children, who are educated in the common schools, receive no religious instruction or knowledge of the Bible except that communicated in said schools; that, while the defendants do not deny that religious instruction is necessary and indispensable to fit said children to be good citizens of the State of Ohio and of the United States, they deny that such instruction can or ought to be imparted in the schools established by the State.”

And the defendants further say, “that the citizens of Cincinnati, who are taxed for the support of the schools under the management of said board of education, and all of whom are equally entitled to the benefits thereof by having their children instructed therein, are very much divided in opinion and practice upon matters connected with religious belief, worship and education; that a considerable number thereof are Israelites who reject the Christian religion altogether, and believe only in the inspired truth of what is known as the Old Testament, and this only in the original Hebrew tongue, and such other religious truths and worship as are perpetuated in their body by tradition; that, also, many of said citizens do not believe the writings embraced in the Bible to be entitled to be considered as containing an authoritative declaration of religious truth; that a still greater number of said citizens, together with their children, are members of the Roman Catholic church, and conscientiously believe in its doctrines, faith and forms of worship, and that by said church the version of the scriptures referred to in the petition is taught and believed to be incorrect as a translation and incomplete; * * * and furthermore, inasmuch as said church has divine authority as the only infallible teacher and interpreter of the same, that the reading of the same without note or comment, and without being properly expounded by the only authorized teachers and interpreters thereof, is not only not beneficial to the children in said schools, but likely to lead to the adoption of dangerous errors, and that by reason thereof the practice of

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reading the King James version of the bible, commonly and only received as inspired and true by the Protestant sects, in the presence and hearing of Roman Catholic children, is regarded by the members of the Roman Catholic church as contrary to their rights of conscience; * * * that there are other religious sects and denominations and bodies of citizens who either do not regard the Bible as the authoritative source of religious truth, or who regard themselves as possessed of the only true sense thereof; and furthermore, a large number of persons in this community who are ready and qualified to act as teachers in said public schools, object to the reading of the Bible in the version in use (or indeed in any version without note or comment) on conscientious grounds, and are thereby precluded from employment as teachers in said schools; that in consideration of these facts said board of education has concluded that it was not possible for it to take upon itself any instruction in religion, and that it is neither right nor expedient to continue in use in said public schools the reading of any version of the Bible as a religious exercise, or any other religious exercise whatever, and therefore has passed the resolutions now complained of by the plaintiffs."

No reply was filed, and the cause was submitted to the court, substantially, upon the facts thus appearing in the petition and answer. A bill of exceptions setting forth the evidence forms part of the record, but it does not substantially vary the case thus made in the pleadings.

Upon hearing, the court gave judgment for the plaintiff, and granted a perpetual injunction against the enforcement of the resolutions in question, or of either of them. And now, to reverse this judgment, the defendants file their petition in error here, assigning for error that the court should have rendered a judgment for them, and not for the plaintiffs below.

J. B. Walker, city solicitor, *Stallo & Kittredge*, *Stanley Matthews*, and *George Hoadly*, for plaintiffs in error.

Sage & Hinkle, *William M. Ramsey*, and *King & Thompson*, for defendant in error.

WELCH, J. The arguments in this case have taken a wide range, and counsel have elaborately discussed questions of State policy,

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morality and religion, which, in our judgment, do not belong to the case. We are not called upon as a court, nor are we authorized to say whether the Christian religion is the best and only true religion. There is no question before us of the wisdom or unwisdom of having "the Bible in the schools," or of withdrawing it therefrom. Nor can we, without usurping legislative functions, undertake to decide what religious doctrines, if any, ought to be taught, or where, when, by whom or to whom it would be best they should be taught. These are questions which belong to the people and to other departments of the government.

The case, as we view it, presents merely or mainly a question of the court's rightful authority to interfere in the management and control of the public schools of the State. In other words, the real question is, has the court jurisdiction to interfere in the management and control of such schools, to the extent of enforcing religious instructions, or the reading of religious books therein?

Before proceeding to consider this question, however, it should be observed that if the power be conceded it would seem only to justify the court in suppressing the *first* of the two resolutions in question. The only ground on which counsel attempt to sustain the court in suppressing the *second* resolution is that the two resolutions are so connected and interdependent that they must stand or fall together. But this is by no means true. By suppressing the *first* resolution the court simply commands that there shall be *some* religious instruction or religious reading in the schools, leaving it entirely to the discretion of the board to say how much and what kind of religious instruction shall be given, and what religious books shall be read, and when read, and whether they shall be read with or without "appropriate singing." In perfect consistency with this the second resolution might be left to stand. That resolution merely repeals the rule requiring stated morning readings, with appropriate singing, at the opening of the schools. On the other hand, if the second resolution is also suppressed, all discretion of the board will be taken away, the rule for morning exercises will be made perpetual, and any board, or member of a board, who should hereafter attempt to modify or repeal that rule would be guilty of a contempt of court. As the case stands now, with both resolutions suppressed by the injunction, the board are, in effect, commanded or enjoined, *first*, not to withdraw *all* religious reading and instruction from the schools; and, *secondly*, not to

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withdraw or discontinue the set morning reading of the Bible with singing. It is easy to see that obedience to the second command or injunction would be obedience to both, because as long as this morning exercise is continued, *all* religious reading and instruction is not withdrawn. So far, therefore, from its being true that it is impracticable to enjoin the going into effect of the first resolution, and leave the second resolution in force, the truth is that it is not only practicable, but that such is the very result that ought to be reached if we admit the power of the court to interfere in the matter at all. The power of interference is only claimed to the extent of preventing an *abuse* of the board's discretion, and not for the purpose of taking away that discretion, and thus, so far as concerns religious instruction, placing the schools under the exclusive and absolute control and supervision of the court. On the theory, therefore, of the court's rightful authority to interfere to the extent claimed, it seems to us it must be admitted that its injunction suppressing the *second* resolution, operating, as it must, to restore and make perpetual the rule requiring the stated morning exercises, is erroneous, and that for this reason the judgment must be reversed.

But a reversal of the judgment on this ground alone would by no means end the case. It would still remain, either for this court proceeding to render such judgment as the court below should have rendered, or for the court below, upon the cause being remanded, to decide what I have said was the real question involved, namely, whether the court below had any jurisdiction in the matter. Do the laws of Ohio clothe its courts with power to interfere, either by injunction or mandate, to compel religious instruction and the reading of religious books in the public schools of the State?

If this power exists, it must be found in our State or federal constitution, or in statutes of the State enacted in conformity therewith. We know of no law enforceable by courts of the State above or beyond these.

We are referred to no provision of the federal constitution, nor to any enactment of the State legislature, conferring such a power.

Counsel for the defendants in error, as we understand them, claim to derive this authority of the court from the last clause in section 7, article 1, in connection with section 2, article 6, of the State constitution, which are as follows:

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“SEC. 7. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.”

“SEC. 2. The general assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but no religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this State.”

If we rightly comprehend the arguments, it is claimed on behalf of the defendants in error, (1) that these provisions in the constitution require and enjoin religious instructions, or the teaching of religious doctrines in the public schools, irrespective of the wishes of the people concerned therein; and (2) that this requirement and injunction rests, not upon the legislature alone, but, in the absence of legislative action for that purpose, is a law of the State, *proprio vigore*, binding upon the courts and people.

If it is not conceded, it must be conceded that the legislature have never passed any law enjoining or requiring religious instructions in the public schools, or giving the courts power in any manner, or to any extent, to direct or determine the particular branches of learning to be taught therein, or to enforce instructions in any particular branch or branches. The extent of legislative action, either under the present constitution, or under that of 1802, which contained a provision quite similar to the present, has been to establish and maintain a general system of common schools for the State, and to place their management and control *exclusively* in the hands of directors, trustees, or boards of education, other

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than the courts of the State. The laws establishing this system date back to 1825, and form an important part of the legislation of the State. They have, from time to time, been changed, amended, repealed and re-enacted. While these laws do refer to other branches of learning in the schools, they nowhere enjoin or speak of religious instruction therein. They speak of the "morals" and "good conduct" of the pupils, and of the "moral character" of the teachers; but they nowhere require the pupil to be taught religion, or the teacher to be religious. Much less do they require this to be done against the will of the people interested.

The special laws governing the public schools of the city of Cincinnati are not dissimilar, in this respect to those of a general nature regulating the common schools of the State. The act of January, 1853 (Disney's Stat. and Ord. 775), under which the board were acting at the time they passed the resolutions in question, among other things, provides:

"That the said trustees and *visitors*" (afterward changed to "board of education") "shall have the superintendence of all the schools in said city, organized and established under this act, and from time to time shall make such regulations for the government and *instruction* of the children therein *as to them shall appear proper and expedient*," * * * "and generally do and perform all matters and things pertaining to the duties of their said office, which may be necessary and proper to promote the education, *morals* and *good conduct* of the children instructed in said schools."

This act requires of teachers in the schools of the city the same certificate that is required by the general law relating to public schools, namely, a certificate of "competency and good *moral character*."

If the clause of the State constitution in question do enjoin the teaching of religious doctrines in the schools, either the law-making power of the State, during the legislation of nearly half a century, have failed so to interpret it, or they have acted in apparent disregard of its requirements. Under the old constitution, which in fact contained a more stringent provision on the subject, no legislative action was had for twenty-three years to enforce instruction in public schools in any branch of learning; and at no time since has any law been passed to enforce religious instruction therein.

There is a total absence, therefore, of any legislation looking to the enforcement of religious instruction, or the reading of religious

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books in the public schools; and we are brought back to the question, what is the true meaning and effect of these constitutional provisions on this subject? Do they enjoin religious instructions in the schools? and does this injunction bind the courts, in the absence of legislation? We are unanimous in the opinion that both these questions must be answered in the negative.

The clause relied upon as enjoining religious instructions in the schools declares three things to be essential to good government, and for that reason requires the legislature to encourage "means of instruction" generally, and among other means, that of "schools." The three things so declared to be essential to good government are "religion, morality, and knowledge." These three words stand in the same category, and in the same relation to the context; and if one of them is used in its generic or unlimited sense, so are all three. That the word "knowledge" and the word "morality" are used in that sense, is very plain. The meaning is, that *true* religion, *true* morality, and *true* knowledge shall be promoted, by encouraging schools and means of instruction. The last named of these three words, "knowledge," comprehends in itself all that is comprehended in the other two words, "religion" and "morality," and which can be the subject of human "instruction." True religion includes true morality. All that is comprehended in the word "religion," or in the words "religion and morality," and that can be the subject of human "instructions," must be included under the general term, "knowledge." Nothing is enjoined, therefore, but the encouragement of means of instruction in "general knowledge"—the knowledge of *truth*. The fair interpretation seems to be, that true "religion" and "morality" are aided and promoted by the increase and diffusion of "knowledge," on the theory that "knowledge is the handmaid of virtue," and that all three—religion, morality, and knowledge—are essential to good government. But there is no direction given as to what system of general knowledge, or of religion or morals, shall be taught; nor as to what particular branches of such system or systems shall be introduced into the "schools;" nor is any direction given as to what other "means of instruction" shall be employed. To enjoin "instructions" in "knowledge," the knowledge of *truth* in all its branches—religious, moral, or otherwise—is one thing; and to declare *what* is truth—truth in any one, or in all departments of human knowledge—and to enjoin the teaching

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of *that, as* truth, is quite another thing. To enjoin the latter, would be to declare that human knowledge had reached its ultimatum. This the constitution does not undertake to do, neither as to "religion," "morality," nor any other branch or department of human "knowledge." And even had it so declared what was to be received and taught as religious truth, to the exclusion of all else, it would still be necessary, in order to make the case here claimed, to go further, and show what branches embraced in the injunction are required to be taught in the schools, and that those to be so taught include the subject of religion.

The truth is that these are matters left to legislative discretion, subject to the limitations on legislative power, regarding religious freedom, contained in the bill of rights; and subject also to the injunction that laws shall be passed, such as in the judgment of the legislature are "suitable" to encourage general means of instruction, including, among other means, a system of common schools.

Equally plain is it to us, that if the supposed injunction to provide for religious instructions is to be found in the clauses of the constitution in question, it is one that rests exclusively upon the legislature. In both sections the duty is expressly imposed upon the "general assembly." The injunction is, to "pass suitable laws." Until these "laws" are passed, it is quite clear to us that the courts have no power to interpose. The courts can only execute the laws when passed. They cannot compel the general assembly to pass them.

This opinion might well end here. Were the subject of controversy any other branch of instruction in the schools than religion, I have no doubt it might safely end here, and the unanimous opinion of the court thus rendered be satisfactory to all. The case is of peculiar importance, however, in the fact that it touches our religious convictions and prejudices, and threatens to disturb the harmonious working of the State government, and particularly of the public schools of the State. I deem it not improper, therefore, to consider briefly some of the points and matters so ably and elaborately argued by counsel, although really lying outside of the case proper, or only bearing on it remotely.

The real claim here is, that by "religion," in this clause of the constitution, is meant "Christian religion," and that by "religious denomination" in the same clause is meant "Christian denomina-

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tion." If this claim is well founded, I do not see how we can consistently avoid giving a like meaning to the same words and their cognates, "worship," "religious society," "sect," "conscience," "religious belief," throughout the entire section. To do so, it will readily be seen, would be to withdraw from every person not of Christian belief the guaranties therein vouchsafed, and to withdraw many of them from Christians themselves. In that sense the clause of section 7 in question would read as follows:

"Christianity, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every *Christian* denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

Nor can I see why, in order to be consistent, the concluding clause of section 2, article 6, should not read as follows: * * *

"But no *Christian*, or other sect or sects, shall ever have any exclusive right to or control of any part of the school funds of the State; *but Christians, as a body, including all their sects, may have control of the whole of said funds.*"

I do not say that such a reading of the sections in question is literally contended for; and yet I see no fair escape from it, if the word "Christianity," or the words "Christian religion," or "the religion of the Bible," are to be interpolated or substituted for the word "religion," at the place indicated.

If, by this generic word "religion," was really meant "the Christian religion," or "Bible religion," why was it not plainly so written? Surely the subject was of importance enough to justify the pains, and surely it was of interest enough to exclude the supposition that it was written in haste, or thoughtlessly slurred over. At the time of adopting our present constitution, this word "religion" had had a place in our old constitution for half a century, which was surely ample time for studying its meaning and effect, in order to make the necessary correction or alteration, so as to render its true meaning definite and certain. The same word "religion," and in much the same connection, is found in the constitution of the United States. The latter constitution, at least, if not our own also, in a sense, speaks to *mankind*, and speaks of the rights of *man*. Neither the word "Christianity," "Christian," nor "Bible," is to be found in either. When they speak of "religion," they must mean the religion of man, and not the religion of any

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class of men. When they speak of "all men" having certain rights, they cannot mean merely "all Christian men." Some of the very men who helped to frame these constitutions were themselves not Christian men.

We are told that this word "religion" must mean "Christian religion," because "Christianity is a part of the common law of this country," lying behind and above its constitutions. Those who make this assertion can hardly be serious and intend the real import of their language. If Christianity is a *law* of the State, like every other law it must have a *sanction*. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do *not* attempt to *enforce* Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they *are* the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion "without partiality," and *therefore* a religion "without hypocrisy." True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. Armed with these, and these alone, it is not afraid nor "ashamed" to be compared with other religions, and to withstand them single-handed. And the very reason why it is not so afraid or "ashamed" is that it is not the "power of *man*," but "the power of God," on which it depends. True Christianity never shields itself behind majorities. Nero and the other persecuting Roman emperors were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority that it began to wane. A form of religion that cannot live under equal and impartial laws ought to die, and sooner or later must die.

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Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere *impartial protection*, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.

Religion is not — much less is Christianity or any other particular system of religion — named in the preamble to the constitution of the United States as one of the declared *objects* of government; nor is it mentioned in the clause in question, in our own constitution, as being essential to any thing *beyond* mere human government. Religion is “essential” to much more than human government. It is essential to man’s spiritual interests, which rise infinitely above, and are to outlive, all human governments. It would have been easy to declare this great truth in the constitution; but its framers would have been quite out of their proper sphere in making the declaration. They contented themselves with declaring that religion is essential to good government; providing for the protection of all in its enjoyment, each in his own way, and providing means for the diffusion of general knowledge among the people. The declaration is, not that government is essential to good religion, but that religion is essential to good government. Both propositions are true, but they are true in quite different senses. Good government is essential to religion for the purpose declared elsewhere in the same section of the constitution, namely, for the purpose of mere *protection*. But religion, morality and knowledge are essential to government, in the sense that they have the instrumentalities for *producing and perfecting* a good form of government. On the other hand, no government is at all adapted for producing, perfecting or propagating a good religion. Religion in its widest and best sense has most, if not all, the instrumentalities for producing the best form of government. Religion is the parent, and not the offspring, of good government. Its kingdom is to be *first* sought, and good government is one of those things which will be added thereto. True religion is the sun which gives to government all its true lights, while the latter merely acts upon religion by reflection.

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Properly speaking, there is no such thing as "religion of State." What we mean by that phrase is, the religion of some individual or set of individuals, taught and enforced by the State. The State can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person or class of persons. If it embarks in this business, whose opinion shall it adopt? If it adopts the opinions of more than one man, or one class of men, to what extent may it group together conflicting opinions; or may it group together the opinions of all? And where this conflict exists, how thorough will the teaching be? Will it be exhaustive and exact, as it is in elementary literature and in the sciences usually taught to children; and, if not, which of the doctrines or truths claimed by each will be blurred over, and which taught in preference to those in conflict? These are difficulties which we do not have to encounter when teaching the ordinary branches of learning. It is only when we come to teach what lies "beyond the scope of sense and reason"—what from its very nature can only be the object of *faith*—that we encounter these difficulties. Especially is this so when our pupils are children, to whom we are compelled to assume a dogmatical method and manner, and whose faith at last is more a faith in us than in any thing else. Suppose the State should undertake to teach Christianity in the broad sense in which counsel apply the term, or the "religion of the Bible," so as also to include the Jewish faith—where would it begin; how far would it go; and what points of disagreement would be omitted?

If it be true that our law enjoins the teaching of the Christian religion in the schools, surely, then, all its teachers should be Christians. Were I such a teacher, while I should instruct the pupils that the Christian religion was true and all other religions false, I should tell them that the law itself was an *unchristian* law. One of my first lessons to the pupils would show it to be unchristian. That lesson would be: "Whatsoever ye would that men should do to you, do ye even so to them; for this is the *law* and the prophets." I could not look the veriest infidel or heathen in the face, and say that such a law was just, or that it was a fair specimen of Christian republicanism. I should have to tell him that it was an outgrowth of false Christianity, and not one of the "lights" which Christians are commanded to shed upon an unbelieving world. I should feel bound to acknowledge to him, moreover, that it violates the

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spirit of our constitutional guaranties, and is a State religion in embryo ; that if we have no right to tax him to support "worship," we have no right to tax him to support religious instruction ; that to tax a man to put down his own religion is of the very essence of tyranny ; that however small the tax, it is a first step in the direction of an "establishment of religion ;" and I should add, that the first step in that direction is the fatal step, because it logically involves the last step.

But it will be asked, how can religion, in this general sense, be essential to good government ? Is atheism, is the religion of Buddha, of Zoroaster, of Lao-tse, conducive to good government ? Does not the best government require the best religion ? Certainly the best government requires the best religion. It is the child of true religion, or of truth on the subject of religion, as well as on all other subjects. But the real question here is, not what is the best religion, but how shall this best religion be secured ? I answer, it can best be secured by adopting the doctrine of this 7th section in our own bill of rights, and which I summarize in two words, by calling it the doctrine of "hands off." Let the State not only keep its own hands off, but let it also see to it that religious sects keep their hands off each other. Let religious doctrines have a fair field, and a free, intellectual, moral, and spiritual conflict. The weakest — that is, the intellectually, morally, and spiritually weakest — will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of "church and state." Among the many forms of stating this truth, as a principle of government, to my mind it is nowhere more fairly and beautifully set forth than in our own constitution. Were it in my power, I would not alter a syllable of the form in which it is there put down. It is the true republican doctrine; it is simple and easily understood; it means a free conflict of opinions as to things divine; and it means masterly inactivity on the part of the State, except for the purpose of keeping the conflict free, and preventing the violation of private rights or of the public peace. Meantime, the State will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality. It means that a man's right to his own religious convictions, and to impart them to his own children, and

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his and their right to engage, in conformity thereto, in harmless acts of worship toward the Almighty, are as sacred in the eye of the law as his rights of person or property, and that although in the minority, he shall be protected in the full and unrestricted enjoyment thereof. The "protection" guaranteed by the section in question, means protection to the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong — the few against the many.

As with individuals, so with governments, the most valuable truths are often discovered late in life; and when discovered, their simplicity and beauty make us wonder that we had not known them before. Such is the character and history of the truth here spoken of. At first sight it seems to lie deep; but on close examination we find it to be only a new phase or application of a doctrine with which true religion everywhere abounds. It is simply the doctrine of conquering an enemy by kindness. Let religious sects adopt it toward each other. If you desire people to fall in love with your religion, make it lovely. If you wish to put down a false religion, put it down by kindness, thus heaping coals of fire on its head. You can't put it down by force; that has been tried. To make the attempt, is to put down your own religion, or to abandon it. Moral and spiritual conflicts cannot be profitably waged with carnal weapons. When so carried on, the enemy of truth and right is too apt to triumph. Even heathen writers have learned and taught this golden truth. Buddha says: "Let a man overcome anger by love, evil by good, the greedy by liberality, and the slanderer by a true and upright life." Christianity is full of this truth, and, as a moral code, might be said to rest upon it. It is *in hoc signo*, by the use of *such weapons*, that Christianity must rule, if it rules at all.

We are all subject to prejudices, deeper and more fixed on the subject of religion than on any other; each is, of course, unaware of his own prejudices. A change of circumstances often opens our eyes. No Protestant in Spain, and no Catholic in this country, will be found insisting that the government of his residence shall support and teach its own religion to the exclusion of all others, and tax all alike for its support. If it is right for one government to do so, then it is right for all. Were Christians in the minority here, I apprehend no such a policy would be thought of by them. This is the existing policy of most governments in the world.

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Christian countries, however, are fast departing from it — witness Italy, Prussia, Spain, England. The true doctrine on the subject is the doctrine of peaceful disagreement, of charitable forbearance, and perfect impartiality. Three men — say, a Christian, an infidel, and a Jew — ought to be able to carry on a government for their common benefit, and yet leave the religious doctrines and worship of each unaffected thereby, otherwise than by fairly and impartially protecting each, and aiding each in his searches after truth. If they are sensible and fair men, they will so carry on their government, and carry it on successfully, and for the benefit of all. If they are not sensible and fair men, they will be apt to quarrel about religion, and, in the end, have a bad government and bad religion, if they do not destroy both. Surely, they could well and safely carry on any other business, as that of banking, without involving their religious opinions, or any acts of religious worship. Government is an organization for particular purposes. It is not almighty, and we are not to look to it for every thing. The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government.

Counsel say that to withdraw all religious instruction from the schools would be to put them under the control of “infidel sects.” This is by no means so. To teach the doctrines of infidelity, and thereby teach that Christianity is false, is one thing; and to give no instructions on the subject is quite another thing. The only fair and impartial method, where serious objection is made, is to let each sect give its own instructions, elsewhere than in the State schools, where of necessity all are to meet; and to put disputed doctrines of religion among other subjects of instruction, for there are many others, which can more conveniently, satisfactorily, and safely be taught elsewhere. Our charitable, punitive, and disciplinary institutions stand on an entirely different footing. There the State takes the place of the parent, and may well act the part of a parent or guardian in directing what religious instructions shall be given.

The principles here expressed are not new. They are the same, so far as applicable, enunciated by this court in *Bloom v. Richards*, 2 Ohio St. 387, and in *McGatrick v. Wason*, 4 ib. 566. They are as old as Madison, and were his favorite opinions. Madison, who

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had more to do with framing the constitution of the United States than any other man, and whose purity of life and orthodoxy of religious belief no one questions, himself says:

“Religion is not within the purview of human government.” And again he says: “Religion is essentially distinct from human government, and exempt from its cognizance. A connection between them is injurious to both. There are causes in the human breast which insure the perpetuity of religion without the aid of law.”

In his letter to Governor Livingston, July 10, 1822, he says: “I observe with particular pleasure the view you have taken of the immunity of religion from civil government, in every case where it does not trespass on private rights or the public peace. This has always been a favorite doctrine with me.”

I have made this opinion exceptionally and laboriously long. I have done so in the hope that I might thereby aid in bringing about a harmony of views and a fraternity of feeling between different classes of society, who have a common interest in a great public institution of the State, which, if managed as sensible men ought to manage it, I have no doubt, will be a principal instrumentality in working out for us what all desire—the best form of government and the purest system of religion.

I ought to observe that, in our construction of the first named of the two resolutions in question, especially in the light of the answer of the board, we do not understand that any of the “readers,” so called, or other books used as mere lesson-books, are excluded from the schools, or that any inconvenience from the necessity of procuring new books will be occasioned by the enforcement of the resolutions.

It follows that the judgment of the superior court will be reversed, and the original petition dismissed.

Judgment accordingly.

RIDGWAY, plaintiff in error, v. MASTING.

(23 Ohio St. 204.)

Dower — release of — fraudulent deed.

A release of dower by a married woman, who joins her husband for that purpose in a deed to defraud purchasers, is binding only as against the releasee and his privies; and where such fraudulent conveyance is set aside at the suit of the party injured, and a transfer of the premises, as against her husband, is decreed to the plaintiff, the wife, in the event of her surviving the husband, is entitled to dower as against such owner. (*See note, p. 252.*)

MOTION for leave to file a petition in error to reverse the judgment of the district court of Brown county.

The original action, which was a proceeding for dower, prosecuted by defendant in error against plaintiff in error, was brought by appeal into the district court, and upon hearing therein, dower was decreed as demanded by the petitioner.

The testimony was placed upon record by bill of exceptions, from which the following state of facts appears :

1. Alonzo Masting, late husband of defendant in error, and under whom she claims, was, during the coverture, seized in fee simple of the lands in controversy.

2. During such coverture the husband contracted with plaintiff in error to sell and convey to her said lands, and, in pursuance of the contract, possession was delivered to her.

3. Afterward said Masting and the defendant in error, his wife, executed and delivered to one W. W. Carpenter a mortgage upon the premises, and subsequently a deed to Delia Carpenter, wife of said W. W., purporting to convey to her the same premises absolutely.

4. Afterward the plaintiff in error brought an action in the common pleas of Brown county, against said Alonzo Masting, W. W. Carpenter and Delia Carpenter, for the purpose of setting aside the mortgage to W. W. Carpenter and deed to Delia Carpenter, upon the ground that they were made in fraud of her rights under said contract of purchase, and to compel said Masting to convey said premises to her according to the terms of said sale; and such proceedings were had therein that said mortgage and deed were, by

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the decree of said court, declared fraudulent and void, and the same were set aside and held for naught as against the plaintiff in error. And it was further decreed therein that said Mastig should, within ten days, convey said premises to the plaintiff in error, and in default thereof that the decree should operate as such conveyance.

5. Said Mastig afterward died, leaving the defendant in error his widow.

White & Waters, for the motion.

Baird & Young, contra.

BY THE COURT. Upon this state of facts we think the district court did not err in decreeing dower to the defendant in error.

That the husband of the petitioner was seized of a dowable estate in the premises during the coverture, is not denied; and the only point made in the case is, as to the effect of Mrs. Mastig's release to the Carpenters.

It is well settled that a release of dower by a married woman is binding only as against the releasee and his privies. 5 Ohio St. 72; 14 id. 450; id. 298; 18 Ohio, 567; 3 Metc. 40. The petitioner was not a party to the action wherein the plaintiff in error was decreed the premises in controversy, nor does that decree purport to affect her rights in any way. The title of the plaintiff in error is not derived through the fraudulent vendees. Those fraudulent deeds were declared void, and the plaintiff took title from the husband of the petitioner, leaving her rights in the property to remain in the exact state they would have occupied had the fraudulent conveyances never been made.

Motion overruled.

NOTE.—To same effect see *Malloney v. Horan*, 10 Am. Rep. 385; 49 N. Y. 111; and see *Morton v. Noble*, 11 Am. Rep. 7; 57 Ill. 178, and cases.—RMP.

State v. Hennessey.

STATE V. HENNESSEY.

(23 Ohio St. 333.)

Indictment — larceny from several owners.

Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment and the taking thereof charged as one offense.

INDICTMENT for larceny. The indictment contained three counts, the second of which charged the defendant with feloniously stealing certain articles the property of Lucinda E. Bevins, and certain other articles, the property of Ebenezer Bevins, etc.

At the trial the prosecution gave evidence tending to prove the taking by the defendant of the articles charged to belong to Ebenezer Bevins, and offered evidence to prove the taking by defendant of the property of Lucinda E. Bevins, and to prove that all the property mentioned in the second count was taken at the same time and that the theft thereof was one and the same transaction. Both offers were rejected by the court, and the evidence confined to proof of the larceny of the property of one of the parties.

The State excepted to the ruling, and brought error.

J. D. Ford, for the State.

C. F. France, for defendant in error.

STONE, J. The objection taken by defendant's attorney to the evidence offered on behalf of the State, and the ruling of the court thereon, proceed upon the concession that the goods charged in the second count of the indictment to have been stolen, were all taken at the same time, and that the taking thereof, although they were the property of different persons, constituted, in fact, but one transaction. This the attorney for the State offered at the time to prove, and such was the legal effect of the allegations of the second count of the indictment, under which the testimony was offered. In sustaining the objection and requiring the prosecutor to treat the charge of stealing the property of each alleged owner as being

necessarily, in law, charges of separate and distinct offenses, we think the court erred.

The particular ownership of the property which is the subject of a larceny, does not fall within the definition and is not of the essence of the crime. The gist of the offense consists in feloniously taking the property of another; and neither the legal nor the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one, or by two or more jointly, is the several property of different persons. The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense.

It is urged, in support of the ruling of the court below, that whatever might otherwise be the law upon this subject, the taking, in such case, of the property of each owner must, under our statute, be held to be a separate and distinct offense, for the reason that the accused, in case he is convicted, and the value of the property taken is found to be less than thirty-five dollars, may be required, as a part of the sentence, "to make restitution to the party injured in twofold the value of the property stolen." This position finds some countenance in the remarks of SEDGWICK, J., in *Commonwealth v. Andrew*, 2 Mass. 409. The question, however, did not arise in that case, and was not determined.

The argument rests upon the assumption that an order of restitution can be made in a particular case in favor of one party only, and hence the conclusion is reached that this provision of the statute can only be complied with by treating the larceny of the goods of each owner as necessarily a separate and distinct offense.

The assumption seems to us to be founded in a misconception of the nature of the prosecution and of the relation to it of the party injured. The prosecution is conducted in the name and by the authority of the State, and the paramount object is the punishment of the offender. The party injured may be incidentally benefited as the result of a conviction, but he is in no sense a party to the proceeding.

The only parties upon the record, and the only parties in fact, are the State upon the one side and the accused upon the other. When, therefore, the subject of a particular larceny is the property of different persons, and is found to be of the aggregate value of less than thirty-five dollars, we see no reason why the jury may not,

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properly, be required to return the value of the property belonging to each, as well as the aggregate value of the whole, or why, such return being made, orders of restitution in favor of the several owners, may not be made conformably thereto.

Being of the opinion that the court below erred in the rulings complained of, we state the following as the rule of law, which, in our judgment, ought to govern similar cases which may now be pending or which may hereafter arise.

Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offense.

HICKOK, plaintiff in error, v. HINE.

(23 Ohio St. 593.)

Navigable rivers — Obstruction of, by bridge — Legislative power.

The rivers of this State, to the extent that they are in fact navigable, are public highways.

A river is regarded navigable which is capable of transporting the products of the country, or upon which commerce may be conducted; and its character as a highway is determined by its navigable capacity rather than by the frequency of its use for navigation.

The entire obstruction of a navigable river, where it is used by the public, is a public nuisance, and where such nuisance works a private injury, the party injured may restrain its continuance by injunction.

The landings and warehouses of individuals on the bank of a navigable river used in connection therewith, are such private property as may be irreparably injured by the destruction of the navigability of the river to such landings and warehouses.

Corporations or public officers are not authorized to obstruct the navigation of a river, under a legislative grant of power, merely for the building of a bridge across a river, where the bridge can reasonably be constructed so as not to destroy the navigability of the river.

Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, or by necessary implication; and such implication arises only

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when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires.

The commissioners of Lake county, under their powers as such commissioners or as the successors of the Lake and Trumbull Plankroad Company, being empowered only in general terms to erect a bridge across Grand river, are not authorized to construct it in such a manner that it will prevent the navigation of the river.* (*See note, p. 262.*)

ACTION by Hine against Hickok and others, commissioners of Lake county, to enjoin them from building a bridge across Grand river in such a manner as to obstruct the navigation thereof.

The case was substantially as follows: Hine was the owner of land on both sides of Grand river, about two and a half miles above Fairport harbor, the point where the river empties into Lake Erie. The river was navigable for vessels and steamboats drawing four and one-half feet of water, from the lake to a convenient landing place on Hine's land.

In 1849, the "Lake and Trumbull Plankroad company" was incorporated by a special act of the general assembly. In 1850, the company built their road from Fairport to Painesville, and built, without objection, a bridge across the Grand river below Hine's premises and at a point where the commissioners were about to rebuild a like bridge. The bridge so built prevented all navigation from the lake to Hine's landing, and that proposed to be built would have the same effect. The bridge built by the company stood a few years and was partly carried away.

The plankroad company surrendered to the commissioners, so far as could be done by law, all its rights to the road in Lake county, and it thereafter became a public highway. The commissioners thereupon rebuilt the bridge, which stood until January, 1868, when it was wholly swept away by a freshet. But Hine remonstrated against the rebuilding the bridge by the commissioners in the first instance, and against that now proposed to be built by them, in such a manner as to obstruct the navigation of the river to his landing-place.

When the plankroad company was chartered, a public road from Painesville to Fairport crossed Grand river a short distance above Hine's landing, where there had been a bridge for many years; but it would cost more to build a bridge there than at the plankroad crossing.

* The foregoing syllabus was prepared by the court.

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From the time the country in the vicinity of Grand river was settled to that of the building of the plankroad bridge, the river was navigated by vessels of light draft from said landing-place in carrying freight from and to points on Lake Erie, and during that time two warehouses were built at the landing to accommodate the limited commerce at that place; but before the building of the bridge the principal part of the business on the river was below the place where it was built. Since the bridge was removed, a small business in transporting freight of various kinds has been done on the river from the lake to Hine's landing; but doubtless the obstruction of the river by the bridge has diminished the amount of business that otherwise would have been done.

At and before the admission of Ohio into the Union, the land along Grand river, like other lands of the Western Reserve, had become the private property of individual owners.

Upon the foregoing facts, the district court held that Grand river, from its mouth to said landing-place, was a highway; that the building of a bridge in the manner proposed was in contravention of the rights of the public and the private rights of Hine; and that the case is a proper one for the interposition of the court, by injunction, to prevent the building of the bridge in a manner to destroy the navigation of the river to said landing-place; and judgment was rendered accordingly.

Estep & Burke, and *J. B. Burrows*, for plaintiffs in error. Grand river being wholly within Ohio, the legislature had full power to grant the right to bridge it, and the riparian owner is not entitled to an injunction against the erection of the bridge. *Gilman v. Philadelphia*, 3 Wal. 713; *Martin v. Waddel*, 16 Pet. 107; *Russell v. Jersey*, 15 How. 426; *Bennett v. Boggs*, Bald. 60; 3 How. 201; 9 id. 471; 13 id. 25; 20 id. 84; 1 W. & M. 402; McA. 212; 4 Bl. C. C. 582; 2 Wal. 403; 5 McLean, 425; Houck on Rivers, 82, 64, 136; 4 Pick. 460; 8 Curtiss, 105; 51 Ill. 266, 273; 25 Pick. 344; 15 Curtiss, 403, 562; 18 id. 300. The act incorporating the L. & T. Plankroad Co., 47 Local Laws, 8, by necessary implication authorized the bridge.

The use of the river for purposes of navigation, at and above the site of the bridge, had been practically abandoned, and it was practically valueless for any purpose of that sort.

Unless the bridge will be both a real, substantial and irreparable

injury to the riparian owner, *and detrimental to the public interests*, no injunction can be granted. *Hutchinson v. Thomson*, 9 Ohio, 52; 2 Black. 474, 545.

R. P. Ranney, for defendant in error.

DAY, J. A reversal of the judgment is sought on two grounds:

1. That Grand river is not a navigable stream at the point in controversy.

2. That, if it can be so regarded, under the circumstances of the case, an injunction is not the proper remedy.

The first question, then, to be considered, is, whether Grand river is a public highway. We are not aware that it has been so declared by any legislative act, other than what is found in the "articles of compact," contained in the ordinance of 1787, declaring the "navigable waters" leading into the Mississippi and St. Lawrence to be "common highways." But it may be regarded as settled in this State that all navigable rivers are public highways. Whether this is based on the ordinance of 1787, or on the principles of the common law applicable to our condition, it is not now necessary to inquire. The doctrine finds support upon both grounds.

Having no tidal waters in the State, the word "navigable," as applied to our rivers, is not used in the technical sense of the common law; but is applied, as in the popular sense, to all rivers that are navigable in fact.

A river is regarded as navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes in law a public river or highway. The character of a river, as such highway, is not so much determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce.

Without recapitulating the facts found upon the evidence by the court below, it is only necessary to say we are of opinion that they are sufficient in law to establish the navigability of Grand river. Upon it the products of the country may be transported; and, by means thereof, in connection with the lake into which it flows, commerce may be carried on with other States and with foreign

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countries. It is, therefore, a highway of the State, and falls also within the description of waters which are now held to be navigable waters of the United States.

It also appears that the navigable capacity of the river extends above the point where it was proposed to erect the bridge in controversy, and through the land of the plaintiff below.

It is equally clear that the bridge would effectually interrupt all navigation at that point, and practically destroy the navigability of the river above the bridge. Such a destruction of the navigable capacity of the river, where it is used by the public, could not be regarded otherwise than as a public nuisance, for it would be an obstruction of a public highway, which, though it may be used by but few, all have the right to use.

The obstruction of the navigation of the river at the point contemplated would work a special damage to the plaintiff below. For it appears that he is the owner of lands on the navigable part of the river above the proposed bridge, and that there were upon his premises a landing and warehouse, which were more or less profitably used in connection with the navigation of the river when it was not obstructed. This was a use of the river at that place, to which he was entitled above that enjoyed by the public; for the public right was that of an easement merely in the waters of the river for the purposes of navigation.

The value of this private use of the river, in connection with the landing and warehouse at the point in question, as well as that of the landing and warehouse themselves, depends upon the extent of commerce that may be carried on to and from that point, and it may vary with the changing circumstances of the country; nevertheless, whatever such value may be, the right remains as the private property of the owner of the land, and the destruction of navigation to that point would render this right valueless, and, therefore, would be to his damage of a special and substantial character.

But it is claimed, in behalf of the defendants below, that, as commissioners of Lake county, they might build the bridge in question, by virtue of the authority vested in them as the successors of the plankroad company. The company has, pursuant to the statute authorizing the proceeding, surrendered its road to the public, whereby it comes under the control of the commissioners. But, if it be conceded that they might exercise the powers granted to the

plankroad company, it remains to be considered whether the company had the power to build a bridge at the place, and like the one in controversy.

The plankroad company was incorporated in 1849, by a special act of the legislature. The act conferred upon the company the power to construct a plankroad, by the most eligible route, from the mouth of Grand river, in Lake county, to such point on the Pennsylvania and Ohio canal, in Trumbull county, as the company might select; and for that purpose, was authorized "to enter upon and take possession of any lands, roads, streets, alleys, stone, timber and earth," necessary for its construction, with all its "necessary appurtenances and appendages, doing no unnecessary damage." This is all the authority conferred by the act, which relates to the question under consideration, except that contained in the following section:

"If said company shall construct said road from Fairport across Grand river to the northerly line of the corporate town of Painesville, and shall erect a good and substantial bridge, suitable for said purpose, across said river, where said road passes over the same, said company shall be entitled to charge as tolls thereon, any amount that by this act they are entitled to charge in the aggregate not exceeding that which they are allowed to charge for five miles on said road."

That the act conferred power to build a bridge across Grand river is not disputed. Though not given in express terms, it is necessarily implied in the grant of power to construct a road from one point to another, between which points the river must be crossed.

But does it confer power to build a bridge of a character and at a place that will obstruct the navigation of the river? Such a power is not expressly given; on the contrary, the act evinces a purpose that no "unnecessary damage" should be done in the construction of the road or its "appurtenances." Moreover, it appears that when the act was passed, the bridge then across Grand river, on the road from Fairport to Painesville, was above the one in controversy and above the navigable part of the river. So it is not at all improbable that the bridge across the river, to be built, as expressed in the act, "where said road passes over the same," was, in the contemplation of the act, to be constructed near the one then in existence, where it would do no "unnecessary damage" to the

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navigation of the river. Without this construction that clause has no significance in the act.

But however that may be, there is no apparent necessity for building the bridge at a place, or in a manner that will obstruct the navigation of the river. On the contrary, it is quite apparent that it might be constructed where it would not have that effect; or that it might at least be constructed with a draw, in such a manner as to be consistent with the use of the river for purposes of navigation.

Since, then, the act confers no express power to obstruct the navigation of the river, and it was not necessary for the accomplishment of the purpose contemplated by the general power granted, the obstruction of the river finds no warrant in the act. Nor can it be claimed under the general powers conferred by law upon the commissioners.

Powers in derogation of the rights of individuals, or of the public, conferred in general terms upon corporations or public officers, must be construed with some degree of strictness. Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, or by necessary implication. Such implication can arise only when requisite to the exercise of the power expressly granted, and it can be extended no further than the necessity of the case requires. *Springfield v. Railroad*, 4 Cust. 63; *Fall River, etc., v. Railroad*, 5 Allen, 221.

The obstruction of the river can not be justified on the ground of prescriptive right. If such right to obstruct a public highway could be acquired, sufficient time had not elapsed. Neither had the plaintiff below, nor those under whom he claims, waived any of their rights. Though the bridge was originally built without objection, no affirmative consent was given. Objections to repairing it were not wanting as soon as it was impaired by floods; and since it has been swept away, and the navigation of the river left again unobstructed, it is insisted that it shall so remain. Nor, indeed, is it claimed that a *right* to reconstruct the bridge so as to obstruct the navigation of the river has been acquired, either by reason of the length of time since one was so constructed, or by the acquiescence in such obstruction by the plaintiff below. But it is insisted that these facts, in connection with the insignificance of the navigation of the river, are of decisive weight in determining,

both the question relative to the navigable character of the river and that of the complainant's right to an injunction. Undeniably there is much force in these considerations; still, the importance of this as well as other inlets of the lake to the commerce of the State, and the growing necessity of their preservation for that purpose, admonish us that they should not have an undue weight, for the purpose of upholding claims in derogation of the rights of the public and of individuals.

Since, then, the commissioners had no lawful authority to obstruct the navigation of the river, and the obstruction they proposed to erect would occasion a public nuisance that would work a private damage to the plaintiff below, we are not prepared to say, that the court below erred in holding that an injunction was a proper remedy to be enforced in the case. It would seem that no other remedy was adequate to the peculiar relief sought. The right to build a bridge was not denied, but the contest related to the *kind* of bridge that might lawfully be constructed. An injunction was sought only against the building of a bridge without a draw, and thereby to necessitate the construction of a draw-bridge, so that both the easement of the road and that of the river might be enjoyed by the public, and that the private right of the plaintiff below might be preserved from substantial and unnecessary damage. The proceeding in equity was, moreover, an especially appropriate mode of defining the powers of the public officers who were the defendants in the action, and of preventing a multiplicity of suits.

On the whole, we are constrained to say, we are not satisfied that the court below were wrong in the result at which they arrived. It follows, that the judgment must be

Affirmed.

NOTE.—In *United States v. Steamer Monticello*, decided by the supreme court of the United States at its October term, 1874, and not yet reported, the question was presented as to whether the Fox river in Wisconsin is a navigable river, and the court held that it is. The court said: "This court held, in the case of the *Daniel Ball*, 10 Wall. 557, that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And a river is a navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water. *The Montello*, 11 Wall. 411. Apply these tests to the case in hand, and we think the question must be answered in the affirmative.

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" * * * It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice SHAW said, (21 Pick. 344,) "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

The learned judge of the court below rested his decision against the navigability of the Fox river below the Depere rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. This is true, and these obstructions rendered the navigation difficult, and prevented the adoption of the modern agencies by which commerce is conducted. But with these difficulties in the way commerce was successfully carried on, for it is in proof that the products of other States and countries were taken up the river in its natural state from Green bay to Fort Winnebago, and return cargoes of lead and furs obtained. And the customary mode by which this was done was Durham boats. As early as May, 1838, a regular line of these boats was advertised to run from Green bay to the Wisconsin portage. (*Doty v. Strong*, 1 Pluney's Wis. R. 316.) But there were difficulties in the way of rapid navigation even with Durham boats, and these difficulties are recognized in the ordinance of 1787, for not only were the "navigable waters" declared free, but also the "carrying places" between them, that is, places where boats must be partially or wholly unloaded and their cargoes carried on land to a greater or less distance. Apart from this, however, the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox river, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce. but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers such as rapids and sand-bars.

The views that we have presented on this subject receive support from the courts of this country that have had occasion to discuss the question of what is a navigable stream. *Moore v. Sanborn*, 2 Mich. 519; *Brown v. Chadbourne*, 31 Me. 1; *People v. Canal Appraisers*, 33 N. Y. 461; *Morgan v. King*, 35 id. 459; *Flanagan v. Philadelphia*, 42 Penn. 319; *Monongahela Bridge Co. v. Ktrk*, 46 id. 112; *Cox v. The State*, 3 Black. 198; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *Hickok v. Hine*, 23 id. 527; *Jolly v. Terre Haute Bridge Co.*, 6 MoL. 237; *Rouse v. The Granite Bridge Co.*, 21 Pick. 348; *Ill. River Packet Co. v. Peoria Bridge Co.*, 33 Ill. 407; *Harrington v. Edwards*, 17 Wis. 586.

See also *Attorney-General v. Woods*, 11 Am. Rep.; 108 Mass. 426, and *Wells v. Smith*, 8 Am. Rep. 621; 3 Oregon, 445, wherein it was held that a stream capable of being commonly and generally useful for floating boats, rafts or logs for any useful purpose, is subject to the public use as a passage-way. But in *Hubbard v. Bell*, 5 Am. Rep. 98; 54 Ill. 110, it was held that a stream only capable of floating logs, and then only during periodical freshets, was not a public stream. The American cases on the subject are collected in a note to *Hubbard v. Bell*. See also *Sherlock v. Bainbridge*, post.—RHP.

DANIELS V. BALLANTINE.

(28 Ohio St. 532.)

Ship and shipping — Contract to tow — delay in voyage — deviation — Proximate and remote cause.

The defendants contracted to tow the plaintiff's barge, by means of a steam-tug, from Bay City, Michigan, to Buffalo, New York. After the voyage had been commenced, and been partly performed, it was voluntarily suspended and delayed by defendants, the barge during the delay being exposed to none of the perils peculiar to the voyage. After the voyage was resumed, and while it was being duly prosecuted, a storm was encountered by which the barge was lost. *Held*, that the defendants, by the mere fact of the delay, did not become responsible for the loss of the barge, although the delay was unreasonable and unnecessary, and although, as the event proved, the barge, but for the delay, would, probably, have been safely towed to its place of destination. In such case the storm must be regarded as the proximate, and the delay as only the remote cause of the loss.

THE plaintiffs in error brought their action in the Common Pleas of Lucas county, to recover the value of a barge which defendants contracted to tow, by means of a steam-tug, from Bay City, Michigan, to Buffalo, New York, and which, in the course of the voyage, was lost in a storm on Lake Erie. On the trial of the case in that court, the plaintiffs, in support of the allegations of their petition, gave evidence tending to prove, "That after said voyage had been commenced, and after it had been partly performed, the defendants delayed on the route three days, and during that time made no effort to prosecute the voyage.

"That such delay was unusual, extraordinary, voluntary, without just cause, and unnecessary.

"That during such delay the weather was pleasant, and if the voyage had been prosecuted in the usual manner and with all practicable, safe, and convenient expedition, the barge would, probably, have been safely and securely towed to its place of destination.

"That after such delay had occurred, the defendants again caused said barge to be taken in tow and commenced again to prosecute the voyage from the place where the delay occurred to the place of destination, and while on such delayed voyage the barge and tug were overtaken by a violent storm, and said barge and its cargo entirely lost.

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"That said barge could only be moved by being towed, and while being towed was entirely under the control of the officers and men on board the tug as to its movements; but the officers and men of the barge remained on board the barge to care for the cargo and direct its movements in following the tug."

The plaintiffs thereupon asked the court to instruct the jury, "that if they should find that said defendants did agree with the plaintiffs to tow said barge from Bay City to Buffalo, and did commence said voyage, and while in the prosecution thereof did voluntarily delay and prolong the same for an unusual and extraordinary period without necessity or just cause, they would be liable to the plaintiffs for the loss of said barge while the voyage was being prosecuted after such delay had occurred, even though such loss should have been occasioned by the dangers of navigation, if the jury should also find that if said voyage had been prosecuted without such delay and with all practicable, safe, and convenient expedition, said loss would not have occurred."

The court refused so to charge the jury, and did instruct them, that even though they should find said defendants did voluntarily delay and prolong said voyage for an unusual and extraordinary length of time without necessity or just cause, and the loss occurred by one of the dangers of navigation after such delay had occurred and while the defendants were thereafter prosecuting said voyage in the usual and ordinary manner, the defendants would not be liable to the plaintiffs for such loss."

The plaintiffs excepted to the charge given, and to the refusal of the court to charge as requested.

The jury returned a verdict for defendants, upon which judgment was entered in their favor. The present petition in error, based upon the exceptions stated, was filed in the district court, and in that court the case was reserved for decision here.

M. R. & R. Waite, for plaintiffs in error.

I. The direct question is presented, whether if, after a *voyage* has been commenced, it is voluntarily delayed and prolonged for an unusual length of time, without necessity or just cause, and a loss happens by one of the dangers of navigation after the delay has occurred, and while the voyage is being thereafter prosecuted in the usual and ordinary manner, the parties bound for the performance of the voyage are liable for the loss.

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When the defendants contracted to tow the barge of the plaintiffs from Bay City to Buffalo, they contracted, in effect, to make a *voyage* by water with a steam tug between those points, and take the barge of the plaintiffs in tow. 1 Phil. on Ins., 3d. ed., § 981.

II. A voluntary and unreasonable delay in the performance of a voyage after it has once been begun is a "deviation." *Mount v. Larkins*, 8 Bing. 108; 21 E. C. L., 244, 245; *Hartleg v. Buggin*, Mich. 2 G. III, Park, 313; 1 Phil. on Ins., chap. 12, § 978, 3d. ed.

III. After a "deviation" those bound to perform the voyage become insurers, and are liable for any subsequent loss during the continuance of the voyage. *Knox v. The Ninetta*, Crabbe, 534; 1 Parsons' Maritime Law, 122, 123, note; *Parker v. James*, 4 Camp. 112; *Read v. Spaulding*, 5 Bosw. 408; *Parmelee v. Wilks*, 22 Barb. 539.

IV. If a shipper becomes his own insurer, he has, as against the ship-owner, all the remedies he would have had if he had been insured by others.

V. If the loss had occurred while the voyage was actually stopped, there would have been no doubt of the liability of the defendants. But it is insisted that the deviation ended with the actual stoppage, and that for the remainder of the voyage the liability of the tug was only such as it would have been if no delay had occurred, and this because the deviation cannot be said to be the proximate cause of the loss. But the deviation was the proximate cause of the loss. *Read v. Spaulding*, 5 Bosw. 395; S. C., 30 N. Y. 630; *Parmelee v. Wilks*, 22 Barb. 540; *Williams v. Grant*, 1 Conn. 491.

It was that which exposed the barge to the peril. It is true the peril was encountered while a voyage was being prosecuted, but it was a delayed voyage. The delay was in operation so long as the voyage continued.

In *Ingleden v. R. R. Co.*, 7 Gray, 86; *Denny v. Central R. R. Co.*, 13 id. 481, 487, the loss happened after the contract had been performed and the property delivered. And *Morrison v. Davis*, 20 Penn. St. 171, and *Denny v. N. Y. C. R. R. Co.*, were considered and not followed in *Read v. Spaulding*, cited *supra*. *Souter v. Baymore*, 7 Barr, 415, was decided the other way, in the case of *The Ninetta*, Crabbe, 534, before cited and approved by Judge PARSONS.

In *Railroad Co. v. Reeves*, 10 Wal. 176, the question involved in this case was not discussed in the opinion. The cases of *Morrison*

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v. Davis and *Denny v. N. Y. C. R. R. Co.* were indeed cited with approbation, but the fact that in the last case the voyage was ended is not noticed.

VI. But again it is said: "Tugboats are not common carriers, and the rules applicable to carriers do not apply to the present case."

It is probably true that these defendants were not common carriers, and that *all* the rules applicable to carriers do not apply to them; but they were certainly bound to perform the voyage in the usual and ordinary manner, and are liable for a failure of duty in this respect.

Kent, Newton & Pugsley, with whom was *Henry B. Brown*, for defendants in error.

STONE, J. The general if not the universal rule applicable in cases where compensation is sought for the consequences of a wrongful or negligent act, or for the violation of a contract, is that the wrong-doer, or party in default, is responsible only for the proximate and not for the remote consequences of his actions.

It has sometimes been said that the policy of the law applicable to common carriers required, as to them, the application of a different rule. The weight of authority seems to be the other way; but how this may be the exigencies of the present case do not require us to determine. It is not alleged that the defendants were common carriers, and if that claim has been made, it is clear it could not be sustained.

The barges were not delivered to the defendants. They were entitled, under the contract, to such control of it as was necessary to enable them, by means of the contemplated agency, to move it to its place of destination, but this was not inconsistent with the plaintiffs' possession, and for most purposes it remained in their custody and care. *Caton v. Rumney*, 13 Wend. 387; *Wells v. Steam Nav. Co.*, 2 N. Y. 204; Angell on Carriers, § 86.

The case undoubtedly falls within the rule referred to; but the rule is itself, in many cases, exceedingly difficult of application. It leaves the proximate cause undefined, and it is found impossible, by any general rule applicable to all cases, to draw the line between those causes of damage which the law regards as proximate and those which are too remote to be the foundation of an action.

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Cases arising under the law of marine insurance are often cited, and are cited in this case to illustrate the distinction, but it is evident they can afford, in cases of this kind, no essential aid. The maxim *causa proxima, non remota spectatur*, as generally applicable in cases of marine insurance; makes the liability of the underwriter to depend upon the question whether the immediate and directly operating cause of the loss was one of the perils covered by the policy.

"In applying this maxim," says Mr. Justice CURTIS, in *Gen. Mut. Ins. Co. v. Sherwood*, 14 How. 351, "in looking for the proximate cause of the loss, if it be found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril." See, also, *Ins. Co. v. Transportation Co.*, 12 Wal. 194.

But in suits at common law, to recover damages for a breach of contract or tort, the maxim is, in this particular, in many cases, properly applied in a less restricted sense. In such actions a principle involved not, in general, applicable in the law of insurance; the liability of the defendant being made to depend upon the natural and probable connection between the breach of contract or tort, and the alleged injurious consequence. Hence, in such cases, while the responsibility of the defendant is not, necessarily, restricted to the direct and immediate consequence of his fault, it does not extend to consequences which cannot be regarded as the natural results of his conduct, and which, on that account, could not, by ordinary forecast, be anticipated.

In the present case, the route which defendants were, necessarily, to pursue in the performance of their contract, lay through lakes Huron and Erie and the rivers or straits connecting those waters. The delay is said, in argument, to have occurred in the St. Clair river. The record is silent upon this subject, but it appears that the voyage was, for the time, wholly suspended. After the delay the barge was again taken in tow, and the voyage was resumed. It is, perhaps fairly, to be inferred that the barge was, in the meantime, in a place of safety; but upon this subject it is sufficient to say that it does not appear, nor is it claimed, that it was exposed, during the delay, to any of the perils incident to the voyage. Nor does it appear, from any fact or circumstance in the case, that there was any reason to apprehend that the perils to be encountered in completing the voyage would be increased by the delay. No fault is imputed to the defendants in resuming the voyage at the time

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they did, and it does not appear that in any thing which subsequently occurred they failed in any respect in the performance of their duty. The storm which caused the loss of the barge was encountered after the delay and while the voyage, after it had been resumed, was being duly prosecuted. As the event proved, the storm would not have been encountered if no delay had occurred; but this was a merely fortuitous result. It was not a consequence which "arose naturally, i. e., according to the usual course of things," from the particular breach of contract complained of. *Hadley v. Baxendale*, 9 Exch. 341. The two events had, in the nature of things, no natural or necessary connection. It was, for aught that appears, as reasonable to expect that the delay would be the means of avoiding extraordinary peril, in the further prosecution of the voyage, as it was to expect a contrary result. And while it is true, as the event proved, that the storm which caused the loss would not have been encountered if there had been no delay, it is at the same time evident that if the delay had been greater, and the default of the defendants, in that respect, more flagrant than it was, the same favorable result would have followed.

The delay cannot, therefore, be regarded as the proximate cause of the loss. It constituted a breach of the contract, and for any injury naturally resulting therefrom the defendants were clearly responsible, but except by a conjunction, which there was no reason to anticipate, and which was merely fortuitous, with a subsequent event, it had no agency in causing the loss of the barge. Of that loss the storm was the proximate and sufficient cause. *Morris v. Davis*, 20 Penn. St. 171; *Denny v. N. Y. C. R. R. Co.*, 13 Gray, 481; *Railroad Co. v. Reeves*, 10 Wal. 176.

It is contended, however, on behalf of the plaintiffs, that the defendants are responsible on another ground. The delay, it is said, constituted in law a deviation which would have discharged the underwriter if the barge had been insured; and assuming that the defendants would, in that case, in the further prosecution of the voyage, have taken upon themselves all the risks covered by the policy, it is claimed that the plaintiffs, being their own insurers, are entitled to all the remedies they would have had if the barge had been insured by others.

A deviation has, it is true, in some circumstances the effect to put an end to the contract of insurance, but in such cases the underwriter is discharged, not because the risks are increased, but

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because they are not the risks he contracted to assume. So long as the risks are varied, it is wholly immaterial whether they are increased or not. If, then, the defendants are responsible on the ground contended for, they would be equally responsible, although it should be made clearly to appear that if there had been no delay, the same, or even a worse storm would have been encountered. In short, the plaintiffs would in that case be enabled, by reason of the delay, to recover the value of the barge without averring, or being able to aver, that the delay caused the loss or operated in any way to their injury. The delay occurring, they would thus, without cost, secure the benefit of an insurance for the remainder of the voyage.

If the barge had been insured against the peril by which its loss was occasioned, and it could be shown that the insurer was discharged by reason of the delay, a different question would have been presented. In such case, the facts being known to the defendants, the loss of the policy might well be held to be the proximate consequence of their wrongful conduct, but in such case the ground of the action would not be the loss of the barge, but the discharge of the underwriter, by reason of which the plaintiffs were deprived of the indemnity which they would otherwise have been able to obtain.

We think the court below did not err in the instructions given to the jury, or in refusing the instructions prayed for.

Judgment affirmed.

THE SCOW M. TUTTLE v. BUCK.

(28 Ohio St. 565.)

Maritime contracts — lien for materials for construction of vessels.

Contracts for building ships or vessels, or for labor done, or materials furnished in their construction, are not maritime contracts.

Under the act to provide for the collection of claims against steamboats and other water-crafts, one who furnishes materials for the construction of a vessel, has a lien on the vessel, and such lien may be enforced in the courts of this State in the mode prescribed in the act. (*See note, p. 273.*)

THE scow M. Tuttle was built at Black River, a port on Lake Erie, in Lorain county, in 1869. Buck, the defendant in error,

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furnished lumber for its construction, and a part of the price remaining unpaid, he, on June 5, 1872, instituted proceedings in the court of common pleas of that county, under the act to provide for the collection of claims against steamboats and other water-crafts, and authorizing proceedings against the same by name, to enforce a lien upon the scow for the amount due.

The scow having been seized upon process issued in pursuance of the act, a demurrer was interposed to the petition. The ground of demurrer specially assigned was, that the court had no jurisdiction of the action, in manner and form as brought, for the reason that the same was within the exclusive jurisdiction of the United States district court sitting in admiralty. The demurrer was overruled and judgment rendered for the plaintiff below. The judgment was, on error, affirmed in the district court of Lorain county; and the object of the present proceeding is to reverse the judgment of affirmance. The point relied upon is the same specially assigned as ground of demurrer to the original petition.

Willey, Terrell & Sherman, for the motion.

N. B. Johnson, contra.

STONE, J. The objection taken to the jurisdiction of the court below rests upon the assumption that the claim sought to be enforced arose out of a maritime contract, and constituted, therefore, a maritime cause of action. If this be so, and the case is not aided by the act of congress of February 26, 1845, it may be conceded that the result contended for would necessarily follow. Under the act of September 24, 1789, the district courts of the United States are invested with exclusive jurisdiction of all maritime causes of action, saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it. The concurrent remedy thus saved to suitors in the courts of common law does not extend to the enforcement of liens by proceedings *in rem*. That remedy, in cases purely maritime, can only be had in the admiralty courts.

On the other hand, if the contract out of which the cause of action arose was not a maritime contract, the case was one of which the district courts, sitting as courts of admiralty had no jurisdiction. In that case it necessarily follows that the statute under which the plaintiff below proceeded, in so far, at least, as it

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relates to the subject of the action, is not obnoxious to the objection suggested in the argument, that it trenches upon the admiralty jurisdiction of the district courts. In so far as the statute deals with causes of action not maritime, and not, therefore, cognizable in the admiralty courts, no question of conflicting jurisdiction arises.

Whether contracts for ship-building, or for labor performed, or materials furnished in the construction of ships or vessels, are maritime contracts, cannot now, in our judgment, be regarded as an open question. That such contracts are not maritime, and not cognizable in the admiralty courts, is affirmed by the whole current of judicial authority, both federal and State. In *People's Ferry Co. v. Beers*, 20 How. 393, the question was presented whether a contract for building a vessel was a maritime contract, and was decided in the negative. In *Roach et al. v. Chapman et al.*, 22 How. 129, the suit was brought to enforce a claim for a part of the price of machinery furnished in the construction of a steamboat, and it was held that the contract, out of which the claim arose, was not a maritime contract. Mr. Justice GRIER, delivering the unanimous opinion of the court, uses this language: "A contract for building a ship, or supplying engines, timber, or other materials for her construction, is clearly not a maritime contract. Any former dicta or decisions, which seem to favor a contrary doctrine, were overruled by this court, in the case of *People's Ferry Co. v. Beers*, 20 How. 393." Since this case was decided, it does not appear that the doctrine thus emphatically announced has, in that court, been questioned.

The subject was alluded to in the subsequent case of *The Belfast*, 7 Wal. 624. Mr. Justice CLIFFORD, delivering the opinion of the court, and speaking of maritime liens, says: "Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts, it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement. Contracts for ship-building are held not to be maritime contracts, and, of course, fall within the same category."

In *Foster et al. v. The Busteed*, 100 Mass. 409, decided in 1868, the supreme court of Massachusetts affirmed that the statutes of

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that State, giving a lien on a ship or vessel for labor performed, or materials furnished in its construction, were constitutional and valid enactments, and that the enforcement of such liens belonged exclusively to the State tribunals. The same questions arose and were decided the same way in the still later cases of *Sinton et al. v. Steamboat Roberts*, 34 Ind. 448; *Thorsen et al. v. The Schooner Martin*, 26 Wis. 488, and *Shepard v. Steel et al.*, 43 N. Y. 52

The act of congress of February 26, 1845, to extend the jurisdiction of the district courts of the United States, in admiralty cases, to the lakes and their connecting waters, purports, in express terms, to save to the parties, not only a concurrent remedy at common law, where the common law is competent to give it, but also any concurrent remedy which may be given by the State laws. This statute deals wholly with causes of admiralty and maritime jurisdiction, and the present not being a case of that character, does not fall within its provisions. In no respect, therefore, is the validity or effect of that enactment here drawn in question.

Motion overruled.

NOTE.—See to the same effect *Foster v. Richard Busteed*, 1 Am. Rep. 125; 100 Mass. 409; *Sheppard v. Steele*, 3 Am. Rep. 600; 43 N. Y. 52; *Thorsen v. Schooner Martin*, 7 Am. Rep. 91; 26 Wis. 488; *Sinton v. Steamboat Roberts*, 7 Am. Rep. 229; 34 Ind. 448.

Since the foregoing case was in type, the Supreme Court of the United States (October term, 1874,) has decided the question in accordance with the foregoing decisions—in *Edwards v. Elliott*, affirming the decision of the court of errors and appeals of New Jersey, reported in 7 Vroom, 449. That portion of the opinion of the United States Supreme Court which relates to this question, is as follows:

“Enough has already been remarked to show that the judgment of affirmance first rendered raises the question whether the contract under which the vessel was built is a maritime contract, and whether the law of the State which gives the remedy pursued by the plaintiffs is in conflict with the federal constitution. Beyond all doubt that question was presented to the State court of errors and was decided by that court adversely to the defense set up by the defendants in the court of appellate jurisdiction. *Elliott et al. v. Edwards et al.*, 6 Vroom, 265; *Edwards v. Elliott*, 5 id. 96.

Materials were furnished by the plaintiffs to the persons who contracted to build the schooner, during the progress of the work. Payment for the materials being refused, they instituted the described proceedings to enforce the lien given them by the state law, in such a case, against the vessel for which the materials had been contracted.

When the proceedings were commenced the schooner was only partially constructed and was resting on her original stocks, having never been launched into the water. She was without a name and had never been registered or enrolled, nor had she ever been licensed or surveyed, and she was without a master or crew, and the record shows she had never had a commander.

Concede all that and still the defendants contend that the plaintiffs, as the furnishers of the materials, had a maritime lien for their respective claims which may be enforced in the admiralty, and that the State law giving the remedy which the plaintiffs pursued is in conflict with that clause of the federal constitution which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. They admit, in effect, that to maintain that proposition it is

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necessary to show that a contract to furnish materials for the construction of a ship is a maritime contract, and they accordingly submit the affirmative of that proposition and insist that all such contracts are maritime, if it appears that the vessel to be constructed is designed for use upon navigable waters.

Maritime contracts are such as relate to commerce and navigation, and unless a contract to build a ship is to be regarded as a maritime contract, it will hardly be contended that a contract to furnish the materials to be used in accomplishing that object can fall within that category, as the latter is more strictly a contract made on land, and to be performed on land, than the former, and is certainly one stage further removed from any immediate and direct relation to commerce and navigation.

Building materials for such a purpose come very largely from the forests and mines, but if it be admitted that a contract to build a ship is a maritime contract it is difficult to affirm that a contract to furnish the materials for the same is not of the same character, although its breach and even its performance may involve judicial inquiries into the business transactions of men, as well in the forests and mines as in the manufactories and workshops of the whole civilized world. Wherever the question, therefore, involved in the present assignment of error, has been considered, the decision has uniformly turned upon the solution of the inquiry, whether a contract for building a ship is or is not a maritime contract? Unless the contract to build a ship is a maritime contract, no one, it is presumed, would contend that the furnishers of the materials for such a purpose can successfully support such a claim; and if it be admitted that the builders of a ship may enforce the payment of the contract price in the admiralty, it would be difficult to maintain that the furnishers of the materials for the purpose are not entitled to pursue their remedy to enforce payment in the same jurisdiction.

Ship building is an occupation requiring experience and skill, and, as ordinarily conducted, is an employment on land, as much as any other mechanical employment, and men engage in the business for a livelihood just as they do in other mechanical pursuits and for the same purpose. Shipwrights, unlike the seamen, have their homes on the land, and not on the seas, and they are seldom ship owners, and not more frequently interested in commerce and navigation than other mechanics. Ships are bought and sold in the market just as ship timber, engines, anchors, or chronometers are bought and sold, even before they are fully constructed and before they are equipped for navigation, and no reason is perceived why a contract to build a ship, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage or propel the ship, should be regarded as maritime.

Attempt is made in vain to point out any distinction in principle between a contract to build a ship and a contract for the materials, as the latter are included in the former, and both fall within the same category under the rules of the civil law. Every one who had built, repaired, or fitted out a ship, whether at home or abroad, or lent money to be employed in those services, had by the civil law a privilege or right of payment, in preference to other creditors, upon the ship itself, without any instrument of hypothecation, or any express contract or agreement subjecting the ship to any such claim, and that privilege still exists in all those countries which have adopted the civil law as the basis of their jurisprudence.

Authorities to support that proposition are unnecessary, as the proposition is conceded by both parties in this controversy, but that rule was never adopted in England, and the reverse of it is the settled rule in our jurisprudence in respect to the question under consideration. Conclusive support to that proposition is found in the case of *The Jefferson*, 20 How. 393, in which the opinion of the court is given by Mr. Justice CATRON. By the statement of the case it appears that it was a libel filed by the assignees of the builders against a new steam ferryboat for a balance due to the builders on account of work done and materials furnished in constructing the hull of the ferryboat. They claimed a lien for the unpaid balance of the price, and the decree was in their favor in the circuit court, but the claimants appealed to this court. When the cause came up for argument the first point made for the claimants was that a contract to build a ship is not one within the jurisdiction of the admiralty courts, even though it be intended to employ the vessel in ocean navigation. Sufficient ap-

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appears in the report of the case to show that the libellants took direct issue upon that proposition, and the court say, in disposing of it, that the only matter in controversy is whether the district courts have jurisdiction in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends.

Neither ship-builders nor furnishers of materials for ship building had any lien at that date under the State law, but the court unanimously decided that the admiralty jurisdiction was limited to contracts, claims, and services which were purely maritime, and to such as had respect to rights and duties appertaining to commerce and navigation. Applying that rule to the case then under consideration the court say: "So far from the contract being purely maritime and touching rights and duties appertaining to navigation, it is a contract made on land to be performed on land."

Convinced or not, every candid inquirer must admit that this court did decide in that case that neither a contract to build a ship or to furnish materials for the purpose is a maritime contract. Nor does that decision stand alone, as the same question since that time has more than once come before the court and been decided in the same way. Such was the view of the court in the case of *Roach v. Chapman*, 22 How. 124, in which the opinion of the court was given by Mr. Justice GRIER.

Proceedings in that case had been instituted in the district court against a steamer to enforce a lien for a part of the price of the engine and boiler, which had been furnished to the builders in another State, where the steamer was built. Process was served and the claimants appeared and filed a plea to the jurisdiction of the court, which was sustained by the circuit court, and the libellants appealed to this court. Able counsel appeared for appellants, but this court decided that a contract for building a ship or for supplying engines, timber, or other materials for her construction is clearly not a maritime contract, and the court remarked that any former *dicta* or decisions which seem to favor a contrary doctrine were overruled. *The Jefferson*, 20 How. 400.

During the same session of the court the same question was again presented and was again decided in the same way. *Morewood v. Enequist*, 23 How. 494.

Express reference is there made to the case of *The Jefferson*, and the remark of the court is that the court there decided that a contract to build a ship is not a maritime contract; that in this country such contracts are purely local and are governed by State laws, and should be enforced by the State tribunals. Decisions to the same effect have been made in the circuit courts, of which the following are examples: *Cunningham v. Hall*, 1 Cliff. 45; *The Orpheus*, 2 id. 35.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the admiralty courts. *The Belfast*, 7 Wall. 144; *The Moses Taylor*, 4 id. 411; *Hine v. Trevor*, 4 id. 555.

Other support to that proposition than the act of congress is not needed, as the provision is to the effect that the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, except where the common law is competent to give to suitors a common-law remedy. Common-law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the district courts. *Brookman v. Hamill*, 43 N. Y. 554; *The Josephine*, 30 id. 19.

Taken together and properly construed those provisions warrant the conclusion that such a party wishing to enforce such a lien may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all and may resort to his common-law remedy in the state courts, or in the circuit court of the United States, if he can make proper parties to give that court jurisdiction of the case. But a maritime lien does not arise in a contract to build a ship or in a contract to furnish materials for that purpose; and in respect to such contracts it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of

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the admiralty courts. *The Belfast*, 7 Wall. 645; *Sheppard v. Steele*, 43 N. Y. 55; *Furran v. Horsford*, 54 Barb. 203.

Objection is also taken to the validity of the State law upon the ground that it is in conflict with the provision of the federal constitution which secures to every party, where the value in controversy exceeds twenty dollars, the right of trial by jury.

Two answers may be made to that objection, either of which is decisive: (1) That it does not apply to trials in the State courts. *Barron v. Baltimore*, 7 Pet. 247; *Trotter v. Com.*, 7 Wall. 828; *Livingston v. Moore*, 7 Pet. 551; *Fox v. Ohio*, 5 How. 424; *Smith v. Maryland*, 18 id. 76; Cooley on Const., 2d ed., 19. (2) That no such error was assigned in the court of errors, and that the question was not presented to, nor was it decided by, the court of errors.

Jurisdiction is not shown unless it appears that some one of the specified questions did arise in the State court and that the question was decided adversely to the party assigning error in this court. *Crowell v. Randall*, 10 Pet. 392; *Snyder v. Williamson*, 20 Ho. 440."

ROGERS, plaintiff in error, v. WOODRUFF *et al.*

(23 Ohio St. 632.)

Sale "to arrive" by a certain time — Custom — evidence of.

W. contracted with R. for the sale of salt to arrive — the contract being in these words: "Cincinnati, October 18, 1862. Sold J. H. Rogers one thousand sacks coarse Liverpool, and two thousand sacks fine Liverpool salt, at \$2.10 per sack, to arrive by the 15th of November." In an action on such contract by the purchaser against the seller, for failing to deliver the salt; *held*, 1. That the words "to arrive by the 15th of November," are words of condition and description only, and do not import a warranty that the salt shall arrive by the day named. 2. In such action testimony offered by the purchaser to show that by the custom of merchants the words "to arrive by the 15th of November," meant "deliverable by the 15th of November," was properly excluded.

ACTION by F. Woodruff and others to recover the price of 883 sacks of Liverpool salt which they alleged they had sold and delivered to the defendant, at \$2.10 per sack. The defendant met this demand by a counter-claim, by which he alleged that, on the 18th day of October, 1862, he made a contract in writing with George W. Phillips, who was the duly authorized agent of plaintiffs, in that behalf, by which contract, plaintiffs sold to the defendant 1,000 sacks coarse Liverpool, and 2,000 sacks fine Liverpool salt, at \$2.10 per sack, all of which was to be delivered by the 15th day of November, then next ensuing, to be paid for by the defendant upon the delivery thereof.

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He further averred that the plaintiffs failed to deliver any of said salt by the 15th of November; that for some time after that date he was ready and willing to receive the same, and so notified plaintiffs; that between that date and December 8, they did deliver the 888 sacks mentioned in the petition; that failing to deliver the remainder he, on December 8, notified them he would not receive any more, but should hold them responsible in damages. He claimed damages at the rate of ninety cents per sack for the salt not delivered.

The plaintiffs replied, denying that they contracted to deliver the salt by November 15th, and averring, among other things, that the contract made by them with defendant was conditional—the salt being sold to arrive, and being expected to arrive; that none of it did arrive by the time named, and that the contract was therefore determined; but that salt having advanced, defendant continued to receive it as it arrived until December 8th, when, salt having declined, he refused to receive any more.

Upon the trial plaintiffs admitted that salt, such as described in the contract, on November 15, 1872, was worth three dollars per sack. On December 8th, it had fallen below contract price.

The contract, put in evidence by defendant, was in these words:

“CINCINNATI, *October* 13, 1862.

“Sold J. H. Rogers one thousand sacks coarse Liverpool, and two thousand sacks fine Liverpool salt at \$2.10 per sack, to arrive by the 15 November.

“GEORGE W. PHILLIPS, JR.”

It further appeared that the salt called for by the contract did not arrive by November 15th; that portions of it did arrive, and were delivered to the defendant, as the same arrived, between November 15th and December 8th.

Defendant called witnesses, and offered to prove that by the general custom of merchants, the phrase “to arrive by the 15th November,” meant “deliverable on or before the 15th of November.” This testimony was objected to and excluded, and defendant excepted.

The case was tried by the court without a jury. The court held the defendant not entitled to recover on his counter-claim, and rendered judgment for plaintiffs, as demanded in the petition, for the value, at the contract price, of the salt delivered.

The defendant moved for a new trial, which being overruled, he took a bill of exceptions setting out all the testimony.

It is now insisted on his behalf :

1. That the contract was not conditional, but absolute ; and that by its terms plaintiffs were bound to deliver the salt by November 15th.

2. That it was competent for the defendant to show that by the custom of merchants, the terms "to arrive by 15th November," meant "deliverable by 15th of November."

D. Thew Wright, for plaintiff in error.

Henry Snow, for defendants in error.

STONE, J. The counter-claim of the defendant below is based upon an executory contract made October 13, 1862, by which, as defendant alleges, the plaintiffs sold and contracted to deliver to him by the 15th of November, then next ensuing, 3,000 sacks of Liverpool salt. This allegation of the counter-claim is denied by the reply, and is not, in our judgment, supported by the contract given in evidence.

Effect is, of course, to be given to the words of the contract, "to arrive by the 15th of November," but the question is, what effect? They are, as we think, words of condition and description only, and cannot be construed as a warranty that the salt shall arrive.

They serve to distinguish the salt which was the subject of the contract from the mass of salt of the same variety found in the market. The salt plaintiffs contracted to sell and defendants to buy, was not salt which plaintiffs may then have had on hand, or salt which had previously arrived. It was salt which was to arrive between the date of the contract and the 15th of November following. Whether it would arrive or not depended upon contingencies, not absolutely within the control of either party. If it arrived within the time limited, plaintiffs were impliedly bound to deliver it upon the contract. If it failed to arrive within that time no such obligation arose. There was, in that case, no salt which, under the terms of the contract, the plaintiffs were bound to deliver or the defendant to accept.

Cases have frequently arisen involving the construction of contracts, in their essential features, not to be distinguished from the

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contract here in question, It has uniformly been held that contracts of this description—for the sale of goods to arrive—are conditional, the words “to arrive,” or other equivalent words, not importing a warranty that the goods will arrive, and the obligation to perform the contract by an actual transfer of the property being, therefore, in the absence of other words showing a contrary intent, contingent upon its arrival. *Alwyn v. Pryor*, Ryan & Moody, 404; *Lovatt v. Hamilton*, 5 M. & W. 639; *Johnson v. Macdonald*, 9 id. 600; *Shields v. Pettee*, 2 Sand. 262. See, also, *Russell v. Nicol*, 3 Wend. 112; Benj. on Sales, 470; 1 Pars. on Cont., title “Of Sales to Arrive,” and cases cited.

In the present case, it is not alleged that any of the salt referred to in the contract arrived, or came within the control of the plaintiffs prior to the 15th of November, nor is it claimed that its arrival was delayed by their agency. The defendant counts upon the contract as made, and bases his claim to recover solely upon the ground that the plaintiffs, by its terms, stipulated absolutely, and at all events, to deliver the salt within the time limited.

2. The testimony offered by defendant to show that by the custom of merchants, the words “to arrive by the 15th of November,” meant “deliverable on or before the 15th of November,” tended materially to change the meaning and legal effect of the contract, and was clearly incompetent.

Judgment affirmed. _

CASES
IN THE
SUPREME COURT
OF
INDIANA.

MANLOVE V. BENDER.

(89 Ind. 371.)

Mutual insurance company — Assessment.

In an action to recover an assessment upon a premium note given to a mutual insurance company, it must be alleged in the complaint, and proved upon the trial, that the losses to be paid accrued during the membership of the defendant in the company.

APPEAL from the Vanderburg common pleas.

This action was brought by Manlove, as receiver of the Farmers and Merchants' Insurance Company, a mutual insurance company, against Bender, to recover on two premium notes executed by him to the company. The defendant answered by general denial and several special paragraphs. Issue was taken on the special paragraphs by general denial thereof. The issues were tried by a jury, and there was a verdict for the defendant. The plaintiff moved the court for a new trial, for these reasons: First, because the verdict is contrary to the evidence; second, because the verdict is not sustained by sufficient evidence; third, because the verdict is contrary to law; fourth, fifth and sixth, because

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the court overruled the demurrers to second, third and fourth paragraphs of the defendant's answer, respectively.

This motion was overruled, and final judgment for the defendant was rendered on the verdict of the jury.

J. R. Trozell, W. R. Manlove, and R. A. Hill, for appellant.

C. Denby and D. B. Kumler, for appellee.

DOWNNEY, J. The only error assigned in this court is the refusal of the court to grant a new trial. The first, second and third reasons assigned for a new trial may be considered together. We have examined the evidence as set out in the bill of exceptions, and are of the opinion that the verdict was right. The evidence, among other things, fails to show that the losses to be paid occurred during the time of the membership of the defendant in the company. See *Manlove v. Naw*, 39 Ind. 289. This fact must be alleged and proved, in order to render the maker of the premium note liable to an action for the assessment. The fourth, fifth and sixth causes for a new trial are not reasons for which a new trial can be granted, and no question is presented to us relating to the sufficiency or insufficiency of the paragraphs of the answer by such a mode of making up the record and assigning errors.

The judgment below is affirmed, with costs.

PETTIT, J., dissents.

HEFFREN V. JAYNE.

(39 Ind. 468.)

Bankruptcy—fiduciary character—Attorney and client.

A claim against an attorney for money collected by him for a client is "a debt created while acting in a fiduciary character," within the meaning of the bankrupt act, and is not barred by a discharge in bankruptcy.

ACTION brought by the appellees to compel the appellant to pay and deliver over certain moneys by him collected as an attorney at law. The complaint was as follows:

"Eben C. Jayne and John K. Walker, partners in co-partnership, doing business under the firm name and style of Dr. D. Jayne

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& Son, complain of Horace Heffren, the defendant in the above entitled cause, and say that the said Horace Heffren is an attorney at law, and that he is now, and for many years past has been, practising his profession as such attorney in the courts of said county; that on or about the — day of May, 1867, the said plaintiffs delivered to the said Heffren for collection a certain promissory note for fifty dollars on one Squire Standiford, and payable to said plaintiffs in their firm name and style of Dr. D. Jayne & Son, as aforesaid; that afterward, to wit, on the 15th day of December, 1869, the said Horace Heffren, as such attorney, did collect and receive from William Standiford, the administrator of the said Squire Standiford, the sum of forty-seven dollars on said note; that the said Heffren has failed and refused, and still fails and refuses, although often requested, to deliver over to the said plaintiffs the said sum of forty-seven dollars so collected as aforesaid; and the said plaintiffs pray said court for a rule against the said defendant to pay said money over to them, and for all other proper relief."

The appellant filed an answer in two paragraphs, which were in substance the same. The substance of each paragraph was, that the appellant had been adjudged a bankrupt since he had received the money mentioned in the complaint. The court sustained a demurrer to each paragraph of the answer, and the appellant excepted, and the ruling of the court is assigned for error.

BUSKIRK, C. J. We think the court committed no error in sustaining a demurrer to the answer.

Section 33 of an act of congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, provides, "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act," etc.

An attorney acts in a fiduciary capacity. The relation between an attorney and his client is one of great confidence, and the law imposes on an attorney the highest degree of good faith. *M'Cormick v. Malin*, 5 Blackf. 509.

We are of the opinion that the case under consideration comes within the last clause of the above quoted section of the bankrupt law.

(The remainder of the opinion disposes of questions of practice.)

Withers v. Fiscus.

WITHERS v. FISCUS.

(40 Ind. 181.)

Verdict — impeachment of — Affidavit of jurors.

The affidavits of jurors showing that they agreed upon a basis upon which the calculation of the amount to be recovered should be made, and that there was a mistake in making the calculation, cannot be received on a motion for a new trial.

APPEAL from the Decatur common pleas.

J. Gavin and J. D. Miller, for appellant.

W. Cumback, S. A. Bonner, C. Ewing, and J. K. Ewing, for appellee.

DOWNNEY, J. There is a single question involved in this case. On the hearing of the motion for a new trial, the appellants offered affidavits of the jurors who tried the cause, to show that in the jury room they agreed upon a certain amount as the basis of their verdict, upon which interest for a designated time was to be counted and added to the agreed sum, and the two amounts together were to constitute the amount of their verdict; that one of their number was directed to make the calculation of the interest, and that by mistake he made the amount of the interest larger than it should have been, which was not discovered until after the verdict was returned into court and the jury discharged. The court refused to receive these affidavits as evidence to set aside the verdict of the jury. If this ruling was correct, the judgment should be affirmed. If not, it should be reversed.

It was proposed to prove two facts: First, that the jury agreed upon the basis upon which the calculation was to be made; and, second, that there was a mistake in making the calculation.

It is a general rule in this State, so far as the decisions of this court have gone, that the affidavits of members of the jury trying a cause will not be received to impeach or set aside their verdict. The rule in England was different, down to the time of Lord MANSFIELD, as we conclude from the examination which we have

made of the authorities. But in *Vaise v. Delaval*, 1 T. R. 11, it was held by him, that affidavits of jurors, offered to show that the jury "tossed up" in order to determine how they should find, were inadmissible.

In *Jackson v. Williamson*, 2 T. R., 281, when the affidavit of all the jurors was offered to show that they had made a mistake in the amount of their verdict, the court refused the application, saying that "it would introduce a very dangerous practice if they were to admit such an affidavit as the one offered. They said that they laid no stress upon its being made by all the jury; if it could be made by all, upon the same principle it might as well be made by some. If any doubt had arisen as to the meaning of the jury, if they had found a sum inadequate to the value proved, the proper time for requiring an explanation was at the trial. It was too late now; such a practice would be productive of infinite mischief; and it was better that the present plaintiff should suffer an inconvenience, than that such a rule should be introduced."

In the United States it seems to be settled, notwithstanding a few adjudications to the contrary, in every State, except, perhaps, Tennessee, that such affidavits cannot be received. *Graham & Waterman*, New Trials, 1429.

In Connecticut it is adopted as a universal rule, that when it is sought to set aside a verdict for the mistake or misconduct of the jurors, those jurors are not competent witnesses to prove such mistake or misconduct. *Meade v. Smith*, 16 Conn. 346, and cases cited.

We need not decide that we would not in any case receive the affidavit of a juror to show a mistake in signing or returning the verdict; but we think the rule which has been so often recognized and applied in this State should be applied in this case. We hold, therefore, that the court committed no error in refusing to receive the affidavits.

The judgment is affirmed, with costs.

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BURSON v. THE NATIONAL PARK BANK OF NEW YORK.

(40 Ind. 173.)

Removal of cause into the federal court.

In an action commenced by a citizen of another State against a citizen of Indiana, the court, on plaintiff's application, and after a trial in which the jury disagreed, ordered the cause to be removed into the circuit court of the United States under the acts of congress. *Held* (1st), That the order was appealable; (2) that the cause could be removed at any time before another trial; and (3) that the acts of congress allowing a plaintiff to remove a cause into the federal courts were constitutional. (*See note, p. 295.*)

APPEAL from the La Porte common pleas.

On the 24th day of September, 1858, at La Porte, Indiana, David G. Rose made his promissory note, by which he promised to pay, sixty days after date, to the order of Samuel Burson, \$6,000, at the Park Bank, New York. The note was indorsed by Burson to Walker, who indorsed it to Early, and he indorsed it to the bank. The bank, it is alleged, was a body politic and corporate by and under the laws of the State of New York, doing business in the city of New York. It is further alleged, by amendment of the complaint, that since the commencement of this action, the said bank became a corporation, under the banking law of congress, as the National Park Bank of New York, and as such succeeded to the right of action. Burson having departed this life, at La Porte, on the 8th day of October, 1858, intestate, and the appellants having been, by the common pleas of La Porte county, appointed on the 8th day of October, 1858, administrators of his estate, the Park Bank filed a claim against the administrators, based upon said promissory note, in the said common pleas court, on the 18th day of June, 1859. The complaint alleges the non-payment of the note, and the circumstances which are claimed to amount to notice to the administrators of its dishonor. After various amendments to the complaint, and after issues had been formed, there was a trial by jury in October, 1868, and the jury failed to agree. In May, 1871, on motion of the plaintiff, upon petition, affidavit and bond filed in form as required by the act of congress, the court ordered that the cause be removed into the next circuit court of the United

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States to be held in the district of Indiana, and ordered the clerk to make out and deliver to plaintiff or its attorney copies of all process, pleadings, depositions, etc., properly certified. From this order the defendants appealed to this court. Several errors are assigned, but they raise no question except as to the correctness of the ruling of the court in ordering the cause to be so transferred.

J. Bradley, for appellants.

J. B. Niles & W. Niles, for appellee.

DOWNEY, J. The appellee has submitted a motion to dismiss the appeal on the ground that there is no final judgment in the common pleas, from which an appeal can be taken. This and also the other questions in the case are of exceeding interest and delicacy. While we feel it to be our duty, as it is our inclination, to concede to the courts of the government of the United States the jurisdiction and powers to which they are justly entitled, we are in duty bound to claim for the courts exercising authority under the State government the full measure of jurisdiction and authority which pertain or belong to them. An appeal lies to this court from all final judgments and also from certain interlocutory judgments of the common pleas. 2 G. & H. 269, § 550, and p. 277, § 576. It is made the imperative duty of this court to inquire into and correct the errors of the inferior courts of the State, from which appeals are taken to it when properly presented. When, as in this case, an order has been made by one of such courts transferring a cause to the courts of the United States, courts of another and distinct government, or when such an order has been properly applied for and improperly refused, it would seem to be the duty of this court, on an appeal properly taken to it, to decide upon the correctness of such ruling. If the ruling is found to have been erroneous, it should be reversed. If it be found to have been correct, it would be the duty of this court to remand the cause to the inferior court, with instructions to carry out the order.

But was the order or judgment of the common pleas final in such sense as to authorize an appeal to this court? The order put an end to the cause, so far as the State courts are concerned, if it shall be allowed to remain in force and be carried out. If the party opposing such order cannot appeal at that stage of the case,

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he can never appeal to this court. It is our opinion that such an order or judgment is so far final as to authorize an appeal to this court. When such an order is applied for and refused, the cause remains pending in the court, and such refusal is in no sense a final order or judgment. But if the point has been properly reserved, the question can be brought to this court, after final judgment, and then decided by this court, as was done in *Skeen v. Huntington*, 25 Ind. 510. When the order has been made for the removal of the cause to the Circuit Court, and an appeal from that court has been taken to this court, and the proper bond filed, or when, in an appeal after the term, a supersedeas has been awarded, and bond executed, further proceedings on the order or judgment for the removal of the cause are at once suspended. 2 G. & H. 271, § 555, and p. 273, §§ 558, 559. If it shall be said that the proper course, when such an order has been made, is to allow the cause to be removed to the United States court, trusting to that court to remand the same to the State court, if it shall be found to have been improperly transferred, we think it may, with equal, if not greater, propriety, be said that the proper course is to allow the appeal to be taken to this court from such order, and trust to this court, if it shall be found that the order was properly made, to remand the cause to the inferior court, with instruction to carry out the order. We are not aware of any reason why such question, which evidently must be decided by one of the tribunals, may not as well be left to the decision of this court as to that of the circuit court of the United States. Especially is this so when, if we should err, the cause may be taken from this court to the Supreme Court of the United States.

It is true that the act of congress provides that when the application has been made in the proper manner for the removal, the State court shall proceed no further in the cause. But this does not settle the question. The question is not, shall the subordinate State court proceed no further? but may the party who has thus been prevented from having the cause tried in the court in which the suit was pending appeal to this court? If he cannot, where and to whom is he to look for a correction of even the most flagrant errors and abuses resulting from the action of the subordinate court? We are aware of the ruling of this court in *The City of Aurora v. West*, 25 Ind. 148, and we have only this to say of that case, that is, that we think the court too readily and without any good reason there-

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for yielded up the rightful jurisdiction of this court. After citing the statute to which we have already referred on the subject of appeals to this court, it is said in the opinion: "The case at bar does not come within any of these provisions, and we do not think that an appeal will lie. It is the duty of the United States court to remand the case to the State court; and when so remanded it will be the duty of the latter court to proceed with the case." And entertaining this view, the court dismissed the appeal. Decisions since made by other courts have thrown additional light on the subject, and the reasoning in these cases, as well as our own judgment, requires us to refuse to be governed by the ruling in that case. Notwithstanding the fact, however, that the court in that case came to the conclusion that it had no jurisdiction of the appeal, it did decide that the case was one in which the removal of the cause to the United States court was not authorized. Without extending this opinion by making extracts from the opinions, we refer to the following cases, which, we think fully justify us in holding that the right of appeal to this court from such an order exists. *Akerly v. Vilas*, 24 Wis. 165; 1 Am. Rep. 166; *Whiton v. The Chicago and Northwestern Railway Company*, 25 Wis. 424; 3 Am. Rep. 101; *The Home Life Insurance Company v. Dunn*, 20 Ohio St. 175; 5 Am. Rep. 642; *Kanouse v. Martin*, 15 How. U. S. 198.

We come, then, to the question whether the action of the court in transferring the case was correct or not. It is insisted by counsel for the appellants, first, that the cause could not properly be transferred after the trial was had by the jury, although they failed to agree upon a verdict, and the case remained to be again tried; and, second, that the act of congress authorizing such transfer at the instance of a plaintiff who has elected to bring, and has brought, his action in the State court, is unconstitutional and void, and therefore the order of transfer was improperly made.

The act in question, that of March 2, 1867, authorizes the transfer in cases wherein there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; and provides that such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit, stating that he has reason to and does believe that, from prejudice or local influence, he will not

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be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering into such court, on the first day of its session, copies of all process, pleadings, etc., and it shall thereupon be the duty of such State court to accept the surety and proceed no further in the suit, etc.

The act of July 27, 1866, authorized the transfer "at any time before trial or final hearing," the words "final hearing" referring, perhaps, to chancery causes. The language of the act of March 2, 1867, as we have seen, is "at any time before the final hearing or trial." Counsel for the appellants contends that the transposition of the words does not require or justify any change in the construction, and that as the cause was once tried, after that it was too late to have it removed to the United States court. They insist that the word "final" is used to qualify the word "hearing," which immediately follows it, and not the word "trial."

In the case of *Akerly v. Vilas, supra*, it was said, in discussing this statute: "What was its intent?" I think it will not be claimed that the word 'final,' as used in this provision, applies to or qualifies the word 'trial.' The word 'hearing' has an established meaning, as applicable to equity cases. It means the same thing in those cases that the word 'trial' does in cases at law. And the words 'final hearing' have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory."

It is further said in that case: "It seems clear therefore, that whenever in any State court there has been a trial in an action at law, or a final hearing in an action in equity, the result of which was an adjudication which, upon the principles governing judicial decisions, would be final between the parties as to any portion of the merits of the action, the case has passed beyond the stage where it was within either the letter or the spirit of this law."

In *The Home Insurance Co. v. Dunn, supra*, the Supreme Court of Ohio follow the case in the Supreme Court of Wisconsin, from which we have quoted, with reference to the construction of the act, and say: "The terms, it seems to us, were intended to

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embrace actions at law and suits in equity, the word 'trial' having reference to an action at law, and the words 'final hearing' to a suit in equity; and that by 'the final hearing or trial of the suit,' is meant a hearing or trial upon the merits, such as results in a final judgment in an action at law, and a final decree in a suit in equity."

It remains to inquire whether there was a trial, in this sense, of the case under consideration. The jury, after hearing the evidence and argument and retiring to their room, were unable to agree, and being discharged, the case stood for trial as it did before the jury was empanelled. According to the case of *Akerly v. Vilas*, the trial must have resulted in "an adjudication which, upon the principles governing judicial decisions, would be final between the parties," etc. And according to the case of *The Home Insurance Co. v. Dunn*, it must have been such a trial "as results in a final judgment in an action at law, and a final decree in a suit in equity." We think it pretty clear that an examination of the facts before a jury which results in a disagreement of the jury and in no verdict, is not a trial within the meaning of the act of congress.

We do not decide that the court would be required to hear and grant such an application during the progress of the trial of the cause. What we decide is, that after a trial which has resulted in a disagreement of the jury, and at any time before the commencement of another trial, the application may be made and granted at the instance of either party.

In *The Home Life Insurance Company v. Dunn, supra*, it was decided that the removal of a cause could not be applied for and granted after a trial and appeal taken to a higher court or a new trial granted.

In *Hadley v. Dunlap*, 10 Ohio St. 1, it was held that the improper refusal of such an application did not affect the jurisdiction of the court so as to render its judgment in the case void.

We come, lastly, to the question as to the constitutionality of that part of the act which authorizes a plaintiff to have a cause removed from the State to the United States court. In *Whiton v. The Chicago, etc., Railway Company*, 25 Wis. 424, this precise point was made, and it was held, the Chief Justice dissenting, that that feature of the act of congress was unconstitutional and void. The argument in brief is this: The constitution of the United States confers upon the courts of the United States jurisdiction in

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certain cases. Congress has power to enact all laws which are necessary to enable the courts of the United States to acquire and exercise this jurisdiction. But it is not necessary that congress should enact a law to enable a plaintiff to withdraw his action from the State court. He had his choice to sue, in the first instance, in the United States court, or in the State court, and having voluntarily commenced his action in the State court, he has waived or abandoned the right to have the cause adjudicated by the courts of the United States. The statute makes no provision for the transfer of causes which might not originally have been commenced in the United States court. When congress has provided the necessary courts and endowed them with the faculties and powers necessary to take jurisdiction of, and hear and decide, the cases referred to in the constitution of the United States, it has done all that is necessary to carry out the power conferred by the constitution; that any thing more than this is over and beyond what it may constitutionally do; that if the litigant voluntarily refuses to use the courts thus provided, and goes into the courts of the State, congress cannot legislate to enable him to remove his case to the courts of the United States, etc. Legislation which allows and authorizes a defendant to remove a suit brought against him, from a State to a United States court, stands upon a different basis, and is supported by different reasons from those which authorize a plaintiff to so remove his action. *McCormick v. Humphrey*, 27 Ind. 144.

Judge STORY, in his work on constitutional law, section 1243, in discussing the powers of congress, says: "Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it."

But, notwithstanding this reasoning, we feel compelled to decide in this case that the feature of the act of congress in question is constitutional.

It appears that in the case of *Whiton v. The Chicago, etc., Railway Company, supra*, the local State court granted the petition, and ordered the removal of the action to the federal court, but directed a stay of proceedings upon its order to enable the defendant to

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appeal from it to the Supreme Court of the State, and provided that in case such appeal should be taken, all proceedings should be stayed until its determination. The appeal was taken, and the order of removal reversed by the Supreme Court of the State in the opinion to which we have referred. The plaintiff did not, however, regard the order for a stay of proceedings until the disposition of the appeal, but procured copies of the papers in the cause from the local State court and filed them in the circuit court of the United States. The latter court thereupon took jurisdiction of the cause, and a new declaration was filed. The defendant moved the circuit court that the cause be dismissed from its calendar, and the papers be stricken from its files, which motion was denied by the court. The cause having been removed to the Supreme Court of the United States on writ of error, the question was there presented whether that part of the act of congress which allowed a plaintiff to apply for and obtain such transfer was constitutional or not. The court held that it was constitutional. The learned judge who delivered the opinion of the court said:

“Third, as to the alleged invalidity of the act of March 2, 1867, under which the removal from the State court was made. The counsel for the defendant, while confining his special objection to this act, questions the soundness of the reasoning of Mr. Justice STORY, by which any legislation for the removal of causes from a State court to a Federal court is maintained. We may doubt, with counsel, whether such removal, before issue or trial, can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the federal court acquires original jurisdiction of the causes. But it is not material whether the reasoning of the distinguished jurist in this particular is correct or otherwise. The validity of such legislation has been uniformly recognized by this court since the passage of the judiciary act of 1789.

“The judicial power of the United States extends by the constitution to controversies between citizens of different States, as well as to cases arising under the constitution, treaties, and laws of the United States, and the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the constitution, are mere matters of legislative discretion. In some cases, from their character, the judicial power is necessarily exclusive of all

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State authority ; in other cases it may be made so at the option of congress, or it may be exercised concurrently with that of the State. Such was the opinion of Mr. Justice STORY, as expressed in *Martin v. Hunter's Lessee*, and this conclusion was adopted and approved by this court in the recent case of *The Moses Taylor*. The legislation of congress has proceeded upon the correctness of this position in the distribution of jurisdiction to the federal courts. The judiciary act of 1789, as observed in the case of *The Moses Taylor*, declares: "That in some cases from their commencement such jurisdiction shall be exclusive ; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed from their commencement exclusively under the cognizance of the federal court. On the other hand, some cases in which an alien or a citizen of another State is made a party may be brought either in a federal or State court, at the option of the plaintiff, and if brought in the State court, may be prosecuted until the appearance of the defendant, and then at his option may be suffered to remain there, or may be transferred to the jurisdiction of the federal courts. Other cases, not included under these heads, but involving questions under the constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error after final judgment. By subsequent legislation of congress, and particularly by the legislation of the last four years, many of the cases which by the judiciary act could only come under the cognizance of the Federal courts after final judgment in the State courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both State and federal courts."

"When the jurisdiction of the federal court depended upon the citizenship of the parties, the case could not be withdrawn from the State courts after suit commenced until the passage of the act of 1867, except upon the application of the defendant. The provision of the constitution extending the judicial power of the United States to controversies between citizens of different States

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had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts. The protection intended against these influences to non-residents of the State was originally supposed to have been sufficiently secured by giving to the plaintiff, in the first instance, an election of courts before suit brought; and where the suit was commenced in a State court, a like election to the defendant afterward. The time at which the non-resident party should be allowed thus to make his election was evidently a mere matter of legislative discretion, a simple question of expediency. If congress has subsequently become satisfied that where a plaintiff discovers, after suit brought in a State court, that the prejudice and local influence, against which the constitution intended to guard, are such as are likely to prevent him from obtaining justice, he ought to be permitted to remove his case into a national court, it is not perceived that any constitutional objection exists to its authorizing the removal, and, of course, to prescribing the conditions upon which the removal shall be allowed. It follows, from the views we have expressed, that the objection to the jurisdiction of this action by the circuit court, upon the grounds advanced by the defendant, cannot be maintained. 13 Wall. 270.

While we feel constrained to follow this ruling, and hold that the feature of the law in question is constitutional, with the utmost deference to the opinion of that high tribunal, we venture to suggest that when it is said, in the opinion, "if congress has subsequently become satisfied that where a plaintiff discovers, after suit brought in a State court, that the prejudice and local influence, against which the constitution intended to guard, are such as are likely to prevent him from obtaining justice, he ought to be permitted to remove his cause into a national court," a case is supposed which is wholly different from that which is provided for in the act. The act of congress does not provide for those cases only where the plaintiff shall discover, "after suit brought," that there are prejudice and local influence, etc. If the act were confined to such cases, there might be little reason for its enactment. But the act does not require the plaintiff to show, in his petition, that he has discovered the existence of such prejudice and influence since the bringing of the action, and there is no such statement in the petition in this case. The plaintiff may, under the act of congress, have the cause removed upon stating the existence of such

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prejudice or local influence, although he knew of the existence thereof as well when he commenced the action as he does when he makes the application.

But following the ruling in this case, we hold that the part of the act in question is constitutional, and that the court of common pleas committed no error in ordering the removal of the cause.

The judgment is affirmed, with costs.

NOTE.—See note to *Berry v. Irick*, 13 Am. Rep. 539-545, wherein the cases relating to the removal of causes from State to the federal courts are collected. In a case just decided by the United States Supreme Court (*Vaunevar v. Bryant*, October term, 1874), the court used the following language:

“The transfer was also properly refused for another reason. The act authorizes the petition for removal to be filed ‘at any time before the final hearing or trial of the suit.’ The hearing or trial, here referred to, is the examination of the facts in issue. Hearing applies to suits in chancery and trial to actions at law. In *Insurance Co. v. Dunn*, 19 Wall. —, it was held, that after a motion for a new trial had been granted, a removal might be had. But after one trial the right to a second must be perfected before a demand for the transfer can properly be made. Every trial of a cause is final until, in some form, it has been vacated. Causes cannot be removed to the circuit court for a review of the action of the State court, but only for trial. The circuit court cannot, after one trial in a State court, determine whether there shall be another. That is for the State court. To authorize the removal, the action must, at the time of the application, be actually pending for trial. Such was not the case here.” — RHP.

THE WESTERN UNION TELEGRAPH COMPANY V. DICKINSON.

(40 Ind. 444.)

Corporation — Citizenship — Transfer of cause to United States court.

Corporations are citizens, within the meaning of the clause of the constitution of the United States which extends the judicial power of the courts of the United States to controversies between the citizens of different States; and they are citizens only of the State or sovereignty that created them. The right to have a cause transferred from a State court to the United States court is not controlled or abridged by the act of the legislature of a State authorizing the service of process on the agent of a foreign corporation. (See note, p. 297.)

APPEAL from the Noble circuit court.

R. W. McBride, for appellant.

J. Morris and *W. H. Withers*, for appellee.

The Western Union Telegraph Co. v. Dickinson.

PERRY, C. J. This suit was brought by the appellee against the appellant, to recover damages for delay in delivering a dispatch conveying the intelligence of the death of the mother of Dickinson, by which he was prevented from attending her obsequies, and claiming five thousand dollars damages for his bereavement. On entering an appearance, the defendant complied with all the requirements of section 12 of the judiciary act of congress of 1789, 1 U. S. Stat. at Large, page 79, and moved the court to transfer the case to the United States circuit court for the district of Indiana, because the defendant was a non-resident corporation, having been created by the laws of the State of New York, and that the plaintiff was a citizen of this State. This application and motion were overruled, and this ruling is assigned for error.

That corporations are citizens within the meaning of the clause of the constitution of the United States which extends the judicial power of the courts of the United States to controversies between citizens of different States, is settled beyond controversy, and that they are citizens only of the State or sovereignty that created them. *Louisville R. R. Co. v. Letson*, 2 How. 497; *Marshall v. Baltimore, etc., R. R. Co.*, 16 id. 314; *Covington Drawbridge Co. v. Shepherd*, 20 id. 227; *Ohio, etc. R. R. Co. v. Wheeler*, 1 Black. 286. There are subsequent cases in Wallace's U. S. Supreme Court Reports to the same effect. The truth of any of the statements of the petition or motion was not denied or controverted, and we are not able to see any good reason why the motion was not granted.

It is insisted that the act of June 17, 1852, 1 G. & H. 272, prevents a change or transfer of the case to the United States court, and that by that act the cause must be tried in the State court where it was commenced; but we do not so understand the act, and we hold that it authorizes the service of process on the agent, and thereby to bind the company by the service, and that the rights secured by the act of congress above referred to, for a change or transfer of the case from the State to the United States court, are not controlled or abridged by the act of our general assembly.

The judgment of the court below is reversed, at the costs of the appellee, with instructions to the court below to sustain the application and motion for a transfer of the cause to the United States circuit court.

WORDEN, J., having been of counsel, was absent.

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Note by PERRY, C. J. It may well be doubted whether the act of our general assembly is not void, as being in conflict with the second section of the fourth article of the constitution of the United States, which says, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

As a corporation is a citizen of the State in which it is created, why is it not entitled to all the privileges and immunities of the citizens of the several States to trade and transact business?

NOTE.—In the case of *Morse v. The Home Insurance Company*, decided in November, 1874, by the Supreme Court of the United States, the decision of the Supreme Court of Wisconsin in the same case, reported in 11 Am. Rep. 580, was reversed and the same principle laid down as in the foregoing case. The opinion of the United States Supreme Court is as follows:

Mr. Justice HUNT delivered the opinion of the court.

This action was commenced in the circuit court of Winnebago county, Wisconsin, to recover the amount alleged to be due upon a policy of insurance issued by the plaintiffs in error to the defendants in error upon the steamboat "Diamond." The Home Insurance Company is a corporation organized under the laws of the State of New York, and having its office and principal place of business in the city of New York.

The company entered its appearance in the Winnebago county suit, and filed its petition to remove the cause to the United States circuit court for the eastern district of Wisconsin. The petition was in the form required by the twelfth section of the act of 1789, and was accompanied by a bond with sufficient bail, as required by that act.

The circuit court of Winnebago county refused to grant the prayer for removal, but proceeded to the trial of the cause. A verdict was rendered against the company, judgment entered thereon, and upon an appeal to the Supreme Court of Wisconsin, the same was affirmed. The insurance company now bring a writ of error to this court.

The case of the "Montello" was argued at the same time with the present; both cases, as it was understood, involving the question whether the Fox river was a navigable water of the United States. The decision of that question is not essential to the judgment to be rendered in the present case.

The refusal of the State court of Wisconsin to allow the removal of the case into the United States circuit court of Wisconsin, and its justification under the agreement of the company and the statute of Wisconsin, form the subject of consideration in the present suit.

The statute of Wisconsin in question was passed in the year 1870, and therein it is declared, that "it shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar corporations formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue

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until another attorney be substituted." Laws of 1870, chapter 55, section 22, page 87, or 1st Taylor's Statutes, page 958, section 22.

Desiring to do business in the State of Wisconsin, and in compliance with the provisions of this statute, the Home Insurance Company, of New York, on the 1st day of July, 1870, filed in the office of the Secretary of State of Wisconsin an appointment of Henry S. Durand as their agent in that State, on whom process might be served. The power of attorney thus filed contained this clause: "And said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States circuit or federal courts."

The state courts of Wisconsin held that this statute and the agreement under it justified a denial of the petition to remove the case into the United States court. The insurance company deny this proposition, and this is the point presented for consideration.

Is the agreement, thus made by the insurance company, one that, without reference to the statute, would bind the party making it?

Should a citizen of the State of New York enter into an agreement with the State of Wisconsin, that in no event would he resort to the courts of that State or to the federal tribunals within it to protect his rights of property, it could not be successfully contended that such an agreement would be valid.

Should a citizen of New York enter into an agreement with the State of Wisconsin, upon whatever consideration, that he would in no case, when called into the courts of that State or the federal tribunals within it, demand a jury to determine any rights of property that might be called in question, but that such rights should in all such cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the State. There is no sound principle upon which such agreements can be specifically enforced.

We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's case* (18 N. Y. R. 128), be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

That the agreement of the insurance company is invalid upon the principles mentioned, the following cases are cited: *Nutt v. Ham. Ins. Co.*, 6 Gray, 174; *Cobb v. New Eng. M. Ins. Co.*, id. 192; *Hobbs v. Manhattan Ins. Co.*, 56 Maine, 421; *Stephenson v. P. F. & M. Ins. Co.*, 54 id. 70; *Scott v. Avery*, 5 H. of L. Cas. 811. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.

In *Scott v. Avery* (sup.), the Lord Chancellor says: "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago. *Kill v. Hollister*, 1 Wils. 129. That case was an action on a policy of insurance in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration. Then, after the lapse of half a century, occurred a case before Lord KENYON, and from the language that fell from that learned judge, many other cases had probably been decided which are not reported. But in the time of Lord KENYON occurred the case which is considered the leading case on the subject, of *Charnock v. Thomson*, 8 T. R. 139. That was an action upon a charter-policy, in which it was stipulated that if any difference should

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arise it should be referred to arbitration. That clause was pleaded in bar to the action brought upon breach of the contract, with an averment that the defendant was, and always had been, ready to refer the same to arbitration. This was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts." Upon this doctrine all the judges who delivered opinions in the House of Lords were agreed.

And the principle, Mr. Justice STONY, in his Commentaries on Equity Jurisprudence (§ 670), says is applicable in courts of equity as well as in courts of law. "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced.

In *Stephenson v. P. F. & M. C. Ins. Co.*, 54 Maine, 70, the court say: "While parties may impose as condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdictions; as conditions precedent to an appeal to the courts, they are void." Many cases are cited in support of the rule thus laid down. Upon its own merits, this agreement cannot be sustained.

The 12th section of the judiciary act of 1789 provides that if a suit be commenced in any State court by a citizen of the State in which the suit is commenced, against a citizen of another State, where the matter in dispute exceeds \$500, and the defendant, at the time of entering his appearance, shall file a petition for the removal of the cause for trial into the next circuit court of the United States, and shall offer good bail for his proceedings therein, "it shall be the duty of the State court to accept such security and proceed no farther in the cause."

This applies to all the citizens of another State, whether corporations, partnerships, or individuals. It confers an unqualified and unrestrained right to have the case transferred to the federal courts upon giving the security required. In the case recently decided in this court, of *The Home Life Insurance Company v. Dunn*, it was held that no power of action thereafter remained to the State court, and that every question, necessarily including that of its own jurisdiction, must be decided in the federal court.

The statute of Wisconsin, however, provides as to a certain class of citizens of other States, to-wit, foreign corporations, that they shall not exercise that right, and prohibits them from transacting their business within that State, unless they first enter into an agreement, in writing, that they will not claim or exercise that right.

The Home Insurance Company is a citizen of New York, within this provision of the Constitution. As such citizen of another State, it sought to exercise this right to remove to a federal tribunal a suit commenced against itself in the State court of Wisconsin, where the amount involved exceeded the sum of \$500. This right was denied to it by the State court on the ground that it had made the agreement referred to, and that the statute of the State authorized and required the making of the agreement.

We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation.

The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States. The

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requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the status of the two in this respect.

We do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the State. These questions have been before the court in other cases, but they do not arise here. In *Paul v. Virginia*, 8 Wall. 168, Mr. Justice FIELD used language, in speaking of corporations, which has been supposed to sustain the statute in question: "Having," he says, "no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote public interest."

So in the *Bank of Augusta v. Earle*, 18 Peters, 519, the language of Chief Justice TANNY has been invoked for the same purpose.

In each of these cases, the general language of the learned justice is to be expounded with reference to the subject before him. They lay down principles in general terms, which are to be understood only with reference to the facts in hand. Thus, the case in which the opinion was delivered by Mr. Justice FIELD was one involving the construction of that clause of the United States Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and of that clause regulating commerce among the States, not of the one now before us. It involved the question whether the State might require a foreign insurance company to take a license for the transaction of its business, giving security for the payment of its debts, and decided that taking insurance risks was not a transaction of commerce, within the meaning of the two clauses of the Constitution cited. It had no reference to the clause giving to citizens of other States the right of litigation in the United States courts, and certainly had no bearing upon the right of corporations to resort to those courts, or the power of the State to limit and restrict such resort.

It was not intended to impair the force of the language used by Mr. Justice CURRIE in the *La Fayette Insurance Company v. French*, 18 How. 407, where he says: "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 18 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States, and by this court; provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." Nearly the same language is used by Mr. Justice NELSON in *Ducat v. The City of Chicago*, 10 Wall. 400.

None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others.

The case of the *Bank of Columbia v. Okeley*, 4 Wheat. 285, is relied upon by the court below to sustain the statute and the agreement in question. In that case it was provided, in the 14th section of the charter of the bank, that whenever a borrower of the bank should make his note by an agreement in writing, negotiable at the bank, and neglected its payment when due, the president of the bank should cause a demand in writing to be served upon the delinquent, and if the money was not paid within ten days after such demand it was made lawful for the bank to present to the county clerk the note so unpaid, with proof of the demand, and to require him to issue an execution or attachment against the debtor. Before such execution could issue the

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bank was required to file an affidavit of the amount due on the note. "If the defendant shall dispute the whole or any part of the debt (the statute adds) on the return of the execution, the court shall order an issue to be joined and a trial to be had, and shall make such other proceedings that justice may be done in the speediest manner." This statute was sustained in the case cited. Mr. Key, for the plaintiff, argued in its support on the theory that the whole effect of the provision was to authorize the commencement of a suit by attachment instead of the usual common-law process. Mr. Jones, *contra*, contended that it was in violation of the provision of the Constitution of Maryland and of the United States securing to parties the right of trial by jury when the value in controversy exceeded twenty dollars. In rendering the decision the court say: "This court would ponder long before it would sustain this action if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. * * * If the defendant does not avail himself of the right given to him of having an issue made up and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim."

We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

On this branch of the case the conclusion is this:

1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the federal court, upon compliance with the terms of the act of 1789.

2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

3d. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be, had no such statute been passed.

We are of opinion, for the reasons given, that the Winnebago county court erred in proceeding in the case after the filing the petition and the giving the security required by the act of 1789, and that all subsequent proceedings in the State court are illegal and should be vacated. The judgment in that court, and the judgment in the Supreme Court of Wisconsin, should be reversed and the prayer of the petition for removal should be granted, and it is ordered accordingly.

Mr. Chief Justice WAITE dissenting.

I cannot concur in the judgment which has just been announced. A State has the right to exclude foreign insurance companies from the transaction of business within its jurisdiction. Such is the settled law in this court. *Paul v. Virginia*, 8 Wall. 181; *Ducat v. Chicago*, 10 Id. 410; *Bank of Augusta v. Earle*, 13 Pet. 586. The right to impose conditions upon admission follows, as a necessary consequence, from the right to exclude altogether. The State of Wisconsin has made it a condition of admission that the company shall submit to be sued in the courts she has provided for the settlement of the rights of her own citizens. That is no more than saying that the foreign company must, for the purposes of all litigation growing out of the business transacted there, renounce its foreign citizenship and become *pro tanto* a citizen of that State. There is no hardship in this, for it imposes no greater burden than rests upon home companies and home insurers.

This insurance company accepted this condition, and was thus enabled to make the contract sued upon. Having received the benefits of its renunciation the revocation comes too late.

The State court had jurisdiction to try the question of citizenship upon the petition to transfer. Upon the facts I think it was authorized to find that the company was, for all the purposes of that action, a citizen of Wisconsin, and refuse the order of removal.

I concur in this dissent.

D. DAVIS, Justice.

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SHERLOCK, appellant, v. BAINBRIDGE.

(41 Ind. 38.)

Navigable river — right of riparian owner to build wharf — rights of persons navigating a river.

The owner of land bordering on a navigable stream may build a wharf for his own use or for the use of the public, but he must so construct it as not to interfere with the free navigation of the river. (*See note, p. 318.*)

One navigating a river has the right to land at such wharf as suits his convenience, and if in so doing the current of the river or other circumstances carries the stern of his boat down stream so that a portion of his boat's length lies in front of an adjoining wharf, but still in the navigable water of the river, he is not a trespasser and cannot be made liable for any consequential damages which may be sustained by the owner of the wharf, provided he use due care and dispatch, and subject others to no unnecessary inconvenience.

ACTION by the appellee against the appellants.

The complaint contained four paragraphs, but a demurrer was sustained to the third, and it need not be noticed. The other paragraphs are as follows :

“First. The said plaintiff complains of said defendants, and says that on the 1st day of June, 1857, and on divers other days and times, between that day and the day of the commencement of this suit, the said defendants, without leave, wrongfully entered upon a certain piece or tract of land lying and being in the city of Madison, county of Jefferson, and State of Indiana, described as follows: River block No. 5, south of Ohio street, in the city of Madison, county of Jefferson, and State of Indiana, running to low-water mark on the Ohio river, of which the plaintiff, at the date aforesaid, and at all times since, continually was, and still is, the owner; and the defendants, on the day and during the time aforesaid, continually took possession of, used, occupied, broke, and destroyed the wharf-boats of the plaintiff, then and there, during the time aforesaid, on, attached to, connected with, tied to, and belonging to, said property, by which the plaintiff was damaged to the amount of \$10,000.

“Second. For second paragraph of complaint, plaintiff says that on said 1st of June, 1857, and at all times continuously from said date until the commencement of this suit, he was the owner and

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possessor of certain wharf-boats afloat upon the Ohio river, attached and anchored to the said real estate mentioned in the first paragraph, then and there belonging to said plaintiff, and that said defendants, during all said time at and between the periods aforesaid, were the owners of certain steamboats then navigating the Ohio river, daily passing and repassing said wharf-boats belonging to the plaintiff as aforesaid ; and plaintiff avers, that on said 1st of June, 1857, and on divers other days and times between said date and the day of commencing this suit, the said defendants did run, steer, and navigate their said steamboats in, upon, and against the plaintiff's wharf-boats aforesaid, so as to break, damage, spoil, and injure said wharf-boats, and did run and steer their said steamboats, unnecessarily, so near to and against said wharf-boats as to throw said wharf-boats out of the water and upon the shore to which they were attached, thereby doing great damage to said wharf-boats, to the injury of the plaintiff \$10,000.

“Fourth. And for fourth paragraph, plaintiff says that he is now, and has been for more than ten years last past, the owner and occupier of the said land mentioned in the first paragraph of this complaint, which said land is bounded on the south by low-water mark on the Ohio river, and that he and those under whom he claims have for a long time, to wit, for the period of twenty years, enjoyed, as appurtenant to said land, the right and privilege of erecting and maintaining a wharf and wharf-boats on said land ; and plaintiff says that on said 1st of June, 1857, and during all the time between that date and the day of the commencement of this suit, the said defendants were the owners and possessors of said steamboats in the second and third paragraphs of this complaint mentioned, and with them, by their agents and employees, navigated the Ohio river, as in said paragraphs stated, making the landings as therein stated, and that they did, with their said boats, as therein stated, unnecessarily strike against, injure and molest, lay up against the said wharf-boats of the plaintiff, and obstruct passage to and from the wharf and wharf-boats of said plaintiff, as stated in said paragraphs, to the great injury of the plaintiff ; and he further states that said defendants, when making landings at the city of Madison aforesaid, landed twice every day and oftener at a wharf owned by one ——— Stout, and unnecessarily and without any cause, in making said landings twice every day and oftener, lapped over and upon the wharf-boat of the plaintiff, and for a

long time at each landing did occupy the river in front of the plaintiff's wharf, and so, during the time of their landing, and when so landed, interrupt and prevent ingress to, and egress from, his said wharf-boat, to the great injury and damage of the plaintiff; and he says that said defendants, in making their landings at the times before mentioned, did strike against, break, and injure the said wharf-boat of said plaintiff and push and throw the said wharf-boat upon the dry land; and plaintiff says that by reason of defendants' so throwing and pushing his said wharf-boat upon the dry land as aforesaid, he has been compelled to pay, and did pay, large sums of money to restore the same to the water and to repair it, and he says that said wrongs and trespasses of said defendants on the property of the plaintiff, so done and committed as aforesaid, were done purposely to injure his aforesaid property, and without any necessity whatever; and said defendants refuse to discontinue said wrongs and trespasses, but threaten to continue the same; wherefore the plaintiff prays judgment for the sum of \$10,000, and furthermore prays that the defendants may be enjoined from injuring the plaintiff's property as aforesaid, by their repeated daily trespasses as aforesaid, and that they be required so to use their property and enjoy all their rights and privileges as not to trespass in manner aforesaid, upon the property of the plaintiff, and for all proper relief."

To this complaint a general denial was filed, as well as other pleadings not necessary to be noticed in this opinion; and the cause was tried by a jury, who returned a verdict for the plaintiff for the sum of \$5,000, on which judgment was rendered; a motion for a new trial, made by the defendants, having been overruled, and exceptions taken.

It may be gathered from the evidence, that next above the plaintiff's wharf, that is, up the river, there is a street called West street, sixty feet in width; and next above West street is another wharf, called Roe's Wharf, one hundred and sixty-eight feet in width, up and down the river; then comes a narrow alley, and then another wharf, called the City Wharf, one hundred and sixty-eight feet in width; so that the plaintiff's wharf is below the other two. There was evidence tending to show that, for years before the commencement of the suit, the defendants were in the habit of landing their steamboats frequently, and sometimes making several landings daily, at Roe's wharf, and sometimes lying there several hours; that

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when thus landed, the stern of the boats thus landed would lap down below the upper portion of the plaintiff's wharf, and sometimes strike against the plaintiff's wharf-boat, doing it injury, and sometimes driving the wharf-boat and the float ashore, causing expense in repairing and replacing the same; that when the defendants' boats were thus landed, with their sterns lapping down below the upper portions of the plaintiff's wharf, as above stated, other boats, in attempting to land at the plaintiff's wharf, by crowding between the steamboats and the plaintiff's wharf-boat, would sometimes push the latter ashore, causing damage and injury; that by reason of the landing of defendants' boats at Roe's wharf, with their sterns extending down, as above stated, other boats navigating the river, which would otherwise have landed at the plaintiff's wharf, could not conveniently make that landing, and landed at the city wharf, whereby the value, business, and profits of the plaintiff's wharf were greatly diminished.

The above is not a full statement of the evidence, but it is a sufficient summary thereof to develop the questions on which the case must be decided, and to show the application of the charge of the court, which will now be noticed.

The court, of its own motion, charged, amongst other things, as follows:

“If you find from the evidence that the defendants, in landing their boats at another wharf-boat, lapped over and upon, to any extent, the plaintiff's wharf-boat, but doing no damage to the wharf-boat, stage planks, and other appendages, or float, to said wharf-boat, or that in landing at said other wharf lapped over to any extent the plaintiff's wharf-boat without touching it, these acts, if done without the plaintiff's consent, are trespasses; for the plaintiff has a right to have free access for steamboats to and from his wharf-boat that may wish to patronize it, and to the free use of all the adjacent waters near to, and in front of, his wharf-boat, irrespective of any skill with which the defendants' boats may be managed; and these acts, if done within six years immediately before the commencement of this suit, you should find for the plaintiff; but you can only assess nominal damages for these acts, unless they prevented other steamboats in getting to and from plaintiff's wharf-boat to take on and discharge freight or passengers, or that other boats have, by reason of these acts, landed to take on or discharge freight or passengers at some other wharf-boat instead of the

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plaintiffs; and if such is the case, then you should find for the plaintiff for such amount of damages as he has actually sustained by such acts, unless the evidence shows that the defendants' acts in lapping over without touching plaintiff's wharf-boat were done with malice, insult, or deliberate oppression, and if you find that is the case, you may, in addition to the actual damages sustained, give such exemplary damages as shall tend to prevent a repetition of the injury."

The charge was excepted to by the defendants below, and was made the foundation, in part, of the motion for a new trial. Error is assigned upon the ruling below in overruling the motion for a new trial.

C. E. Walker, McDonald, Butler & McDonald, J. Sullivan, Hord & Hendrick, Walker & Roberts and Lincoln, Smith, Warnock & Stephens, for appellants.

H. W. Harrington and C. A. Korbly, for appellee.

WORDEN, J. After stating the foregoing facts, the appellee claims that the appellants cannot be heard to say that the charge was erroneous, because it was embodied in charges asked by them to be given. We have examined the charges asked by the appellants, and find that none of them embodied such statement of the law as is contained in the charge above set out.

The questions arising in the case have been elaborately and very ably discussed by the respective counsel in the cause, both orally and in printed briefs, by which our labors have been materially lightened, and much time saved.

It is contended by counsel for the appellants, that the title of the owner of land bordering upon our navigable rivers extends only to high-water mark, while it is claimed, on the other side, that such title extends to low-water mark. This question, we think, does not arise in the case, and need not be decided, inasmuch as it was admitted on the trial that the plaintiff was the owner of the land, as stated in his complaint, and inasmuch as the result must be the same, whether the title of the appellee be deemed to extend only to high-water mark or beyond it. The question, however, is an important and interesting one, and as counsel on both sides have cited many authorities upon the point, we here refer to some of the

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more important ones. *The People v. The Canal Appraisers*, 33 N. Y. 461; *McManus v. Carmichael*, 3 Iowa, 1; *The Steamboat Magnolia v. Marshall*, 39 Miss. 109; *Stevens v. The Patterson and Newark Railroad Co.*, 34 N. J. 532; *Railroad Company v. Schurmeir*, 7 Wall. 272; *Lessee of Blanchard v. Porter*, 11 Ohio, 138; *Booth v. Shepherd*, 8 Ohio St. 243; *Ensminger v. The People, etc.*, 47 Ill. 384.

The following cases in Indiana support the doctrine that the title of the riparian proprietor upon the Ohio river extends to low-water mark. *Stinson v. Butler*, 4 Blackf. 285; *Cowden v. Kerr*, 6 id. 280; *Doe v. Hildreth*, 2 Ind. 274; *Gentile v. The State*, 29 id. 409; *Bainbridge v. Sherlock*, id. 364, which was this case when before in this court; and *Martin v. The City of Evansville*, 32 id. 85.

This seems also to be the doctrine maintained in Ohio and Illinois, and also in Mississippi, as to the Mississippi river.

We may remark, in conclusion upon this point, that whatever might be our views upon this question, were it an original and open one, we think it should perhaps be regarded as settled by the decisions in this State, extending as far back as 1837, and continuing in an unbroken series down to the present time. These decisions have become a rule of property. Purchases have been from time to time made with a view to them; and were the question necessarily involved in the case, we should hesitate long before overturning them and establishing a new rule. But, as before stated, the question is not involved in the case. We proceed to the questions in the case.

It is hardly necessary to say that the Ohio is a navigable river. It was provided in the 4th article of the ordinance of 1787, for the government of the territory of the United States north-west of the river Ohio, that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."

The river being thus made a "common highway," it follows that if the appellee's title does technically extend to low-water mark, or even to the thread of the stream, he cannot so construct his wharf as to materially interfere with the navigation of the river.

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His title to the soil of the shore, or under the water, does not authorize him to obstruct in any way the free use of the river by the public as a common highway. He may build a wharf for the accommodation of the public navigating the river, and for his own private profit, not interfering with the navigation. But all this he may do, though his title extend only to the stream or to high-water mark. Wharves are necessary for the convenience of transportation and commerce upon navigable rivers, and, if constructed so as not to interfere with navigation, aid and facilitate it. It is very well settled by authority that the owner of land bordering on a navigable stream, though his title extend no farther than to the stream, not embracing the shore or land between high and low water mark, may build such wharf.

Thus, in the case of *Bowman's Devises v. Wathen*, 2 McLean, 376, the court say: "We apprehend that the common-law doctrine, as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide. Where a stream, which is clearly not navigable, forms the boundaries of proprietors on each side of it, under the common law, each may claim to the middle of the stream. But this right cannot be exercised to the injury of other rights of the same nature. On navigable streams the riparian right, we suppose, cannot extend, generally, beyond high-water mark. For certain purposes, such as the erection of wharves and other structures for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit."

In the case of *Yates v. Milwaukee*, 10 Wall. 497, the court use the following language: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the cases of *Dutton v. Strong*, 1 Black, 23, and *The Railroad Co. v. Schurmeir*, 7 Wall. 272."

See, also, to the same effect, the case of *Grant v. The City of*

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Davenport, 18 Iowa, 179; also the case of *East Haven v. Hemingway*, 7 Conn. 186.

These cases (and there are, doubtless, others to the same effect) establish the proposition that the appellee has a legal right to his wharf, and is entitled to be protected in the enjoyment thereof, whether he be deemed to have a title to the soil of the shore or otherwise.

But the right thus to construct and use a wharf is subject to the paramount right of the public to navigate and use the river as a common highway, and can in no way interfere with such use of the river by the public. This principle runs through all the cases involving the question. *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, *supra*; *Grant v. The City of Davenport*, *supra*; *Rice v. Ruddiman*, 10 Mich. 125.

The river being thus a common highway, free to all citizens, it follows that every citizen has a right to use it as such, in all of its parts not occupied, for the time being, by others in its navigation. The right to use the stream as a highway is not confined to any particular part or portion thereof, but extends to the entire stream, just as the right to use a common highway extends to all parts thereof. *Williams v. Wilcox*, 8 A. & E. 314; *Morrison v. Thurman*, 17 B. Monr. 249; Angell on Highways, § 226.

The right to navigate the river as a public highway includes, necessarily, the right to stop where the purposes of such navigation require it, for a reasonable length of time, to ship and discharge freight and passengers; just as a coach or cart or wagon may stop on the highway for like purposes. The navigation of public rivers is governed by the same principle that is applied to other common highways. Angell on Highways, § 229. A craft navigating the river, perhaps, has a right to land upon the shore or bank of the riparian proprietor in case of necessity. Angell on Highways, § 74. So, travelers on ordinary highways, in case of necessity, may go *extra viam*. Thompson on Highways, 2. Wharves, though usually constructed for the benefit and profit of the owners, in the charges received for their use, promote and facilitate the business of navigation; and boats may touch at any of them they may choose in the due prosecution of their business.

With these preliminary observations we are prepared to consider the charge given as above set out. The charge given embodies two propositions in substance.

First. That if the appellants' boats, in landing at another wharf, lapped over the appellee's wharf-boat, though without touching it, such acts were trespasses, if done without the consent of the appellee, and this irrespective of any question of skill with which the appellants' boats were navigated.

Second. That the appellee had the right to have free access to his wharf-boat for steamboats that wished to patronize it, and to the free use of all the adjacent waters near to and in front of his wharf-boat; and if the acts of the appellants, in landing their steamboats at another wharf, thus lapping over and upon the appellee's wharf-boat, as above stated, prevented other steamboats from getting to and from the appellee's wharf-boat to take on or discharge freight or passengers, or if other boats, by reason of such acts, landed, to take on or discharge freight or passengers, at some other wharf-boat, instead of the appellee's, the appellants were liable for the damages which the appellee sustained thereby.

The charge thus given was, in our opinion, radically wrong in both particulars.

It would seem, on principle, that even if the appellants' boats had run against the appellee's wharf-boat and damaged it, the appellants would not be liable unless there was some want of skill or care in navigating the appellants' boats. The appellants, as we have seen, had a right to run their boats in all parts of the river, not for the time being occupied by other boats or craft navigating the river, and to stop at any wharf which their business might require. The appellee's wharf or wharf-boat is clearly entitled to no greater immunity, as against a person navigating the river, than if it had been a floating craft navigating the river, in which event, in case of collision, wilfulness, negligence or want of skill would be necessary in order to hold a party responsible. Angell on Highways, § 447. See, as having some bearing upon this question, the cases of *Morrison v. Thurman*, *supra*; *Taylor v. The Atlantic Mutual Ins. Co.*, 37 N. Y. 275; *Dalton v. Denton*, 1 C. B. N. S. 672.

But, however this may be, the charge is radically wrong in holding that the acts of the appellants, as set out, without touching the appellee's wharf-boat, would be trespasses, and in holding that the appellants would be liable to the appellee for damages occasioned by their boats preventing other boats, by the means stated, from landing at the appellee's wharf.

We have already seen that the appellee, whatever may have been

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the extent of his title to the soil, had no right to so construct or use his wharf as to interfere with the paramount right of the public to the free use of the river as a common highway. The appellants had the legal right to navigate the river, and every part thereof, and to stop at such wharves as their business might require. And if in doing so, they, by a portion of the length of their boats, occupied the water in front of the appellee's wharf, they were but exercising a legal right, and could not, in so doing, be trespassing. The appellee was not, in our opinion, entitled "to the free use of all the adjacent waters near to and in front of his wharf-boat," as against parties temporarily occupying the same in due course of the navigation of the river. Such a right in the appellee would be utterly inconsistent with the right of the public to the use of the river as a common highway.

The appellants had the right to land at such wharf or wharves as suited their convenience; and if in doing so the current of the river or other circumstance carried the stern of their boat down stream so that a portion of the boat's length lay in front of the appellee's wharf, but still in the navigable waters of the river, they were but in the exercise of a legal right, and cannot be responsible to the appellee for any consequential damages which he may have sustained by other boats being thereby prevented from landing at his wharf, provided that the appellants, in thus exercising their right, exercised due care, skill, and dispatch, and subjected the appellee to as little inconvenience as was possible, consistently with the exercise of their own rights. Doubtless unreasonable and vexatious delays, thus wrongfully preventing ingress to and egress from the appellee's wharf, would subject the appellants to liability for the damages consequent thereon, but this was not the theory at all on which the case was put to the jury.

We have arrived at conclusions somewhat variant from those reached by the court when the case was here before (29 Ind. 364), but we are satisfied they are in accordance with the weight of the authorities, and in harmony with the general principles of the law as applicable to such cases. The case of *Ball v. Herbert*, 3 T. R. 253, cited in the former opinion, involved a question as to the right to use the banks of a river for towing boats, and has but little, if any, analogy to the case here. The same may be said with reference to the case of *Blundell v. Catterall*, 5 B. & Ald. 268, which involved the question whether or not the public had a

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common law right of bathing in the sea, and as incident thereto, of crossing the shore for that purpose. The case of *Dutton v. Strony*, 1 Black, 23, recognized the right of a riparian owner to erect, for private use, a pier extending into the lake, which served the purpose both of a landing place for freight and for its storage. So do we recognize the right of a riparian proprietor to erect wharves for the landing of vessels navigating the river, but it does not follow that the owner of the pier in the one case, or of the wharf in the other, acquires any rights thereby that can interfere in the use of the lake or river as a common highway by the public. In the former opinion, the following passage is quoted from the opinion of MARTIN, C. J., in the case of *Rice v. Ruddiman*, 10 Mich. 125: "They" (riparian owners) "have the right to construct wharves, buildings, and other improvements in front of their lands, so long as the public servitude is not thereby impaired. They are a part of the realty to which they are attached, and pass with it. Certainly no one can occupy, for his individual purposes, the water in front of such riparian proprietor, and the attempt of any person to do so would be a trespass." It is quite evident, from an examination of that case, that the language above quoted was not intended to convey the idea that no one could temporarily occupy the water in front of such riparian proprietor for the purposes of ordinary navigation, without being a trespasser. The whole statement is made with the qualification that the public servitude was not to be impaired. We quote another passage from the same case, found in the opinion of CHRISTIANCY, J., in which all the judges seem to have concurred. He says: "But this riparian ownership does not carry with it the right to the exclusive and unrestricted use of the lands ordinarily covered by the water; as in the case of rivers, that use must in all cases be subordinate to the paramount public right of navigation, and such other public rights as may be incident thereto. In other words, all the private or individual use and enjoyment of which the land is susceptible, subordinate to, and consistent with, the public right, belong to the riparian owner as against any other person seeking to appropriate it to his individual use."

From the evidence introduced, and the amount of the verdict, it is apparent that the jury must, under the charge of the court, have allowed the appellee damages for the supposed invasion of his

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rights, in other boats being prevented by the boats of the appellants from landing at his wharf.

The entire charge as given being wrong, the judgment will have to be reversed.

There are some questions made as to the pleadings, which, owing to the length of this opinion, we have concluded not to pass upon, inasmuch as when the cause goes back for another trial, the parties can amend their pleadings if they desire to.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

DOWNNEY, J. — For the reason that the decision in this case, as stated in the foregoing opinion, unnecessarily and improperly subordinates the rights of the riparian proprietor to the mere convenience of the navigator, I cannot assent to it.

NOTE. — Obstructions — as a wharf — in navigable rivers made in aid of commerce which do not *materially* injure free navigation are not nuisances. *People v. Rensselaer and Saratoga R. R. Co.*, 15 Wend. 122; *Dalton v. Strout*, 1 Black. (U. S.) 81; Angell on Tide Waters, p. 126; *Delaware & Hudson Canal Co. v. Lawrence*, 2 Hun. (N. Y.) 168; *Mississippi & M. R. R. Co. v. Ward*, 2 Black. (U. S.) 494; *Grant v. Davenport*, 18 Iowa, 179; *Wisconsin River Improvement Company v. Lyons*, 30 Wis. 61. In this last case it was held that the purchaser, under the laws of the United States, of lands bordering on a navigable stream stops at the edge of the stream, but that he has the same right to construct suitable landings and wharves as riparian proprietors on navigable waters affected by the tide. To the same effect is *Railroad Company v. Schurmeir*, 7 Wall. 272. — RMP.

FRANKLIN FIRE INSURANCE COMPANY, appellant v. HAZZARD.

(41 Ind. 116.)

Life insurance — insurable interest — assignment of policy to one not having interest.

A person cannot purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no insurable interest.

A man having a policy of insurance on his own life, sold and assigned the same, with the consent of the company, to one who had no insurable interest in his life. *Held* that the assignee could not recover on the policy.

ACTION by the appellee against the appellant on a life insurance policy, issued by the appellant to one William S. Cone, and by Cone assigned to the appellee.

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Issue, trial, finding, and judgment for the plaintiff below, a motion for a new trial having been made by the defendant and overruled, and exception having been duly taken.

The policy was issued September 2, 1867, and stipulates for the payment of the sum of \$3,000 by the company to the assured, his executors, administrators, and assigns, within ninety days after due notice and proof of interest and of the death of said Cone, deducting therefrom all indebtedness of the party to the company. The premium paid down was \$62.40, and a like premium was to be paid by the assured annually on the 2d of September, during the life of Cone. By the terms of the policy, if the first premium to become due after the issuing thereof should not be paid at the time specified, the policy was to be forfeited, and the policy was not to be assigned without the consent of the company.

The material facts on which we place the decision of the cause, are these: On the 2d of September, 1868, the premium then falling due was not paid. Cone afterward said to the agent of the company that he had concluded not to keep up the policy, and he declined to pay the premium. Finally he sold the policy to the appellee, Hazzard, and on the 17th of September, 1868, duly assigned the same to him, and the assignment was assented to by the secretary of the company, subject to the conditions of the policy. Hazzard was not the creditor of Cone, nor had he otherwise any insurable interest in his life, but he simply purchased the policy and paid therefor the sum of \$20. On the policy being assigned to Hazzard, he arranged with the company for the premium due on the 2d of September, 1868, by paying a part thereof in money and giving a note for the residue, which, we infer, was afterward paid. Cone died in July, 1869.

U. J. Hammond and J. M. Judah, for appellant.

W. Morrow and N. Truster, for appellee.

WORDEN, J. [After stating the foregoing facts.] Can the appellee, on these facts maintain the action?

We place no stress on the fact that the premium was not paid at the time it fell due, because the forfeiture of the policy seems to have been waived by the subsequent receipt, by the agents of the company, of the premium.

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But the question arises whether a person can purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest. This question is one of first impression in Indiana, and the authorities elsewhere are somewhat in conflict upon the point. We therefore feel at liberty to decide it in conformity with what seem to us to be the general principles of law applicable to the question. There can be no doubt that a policy issued to Hazzard upon the life of Cone, the former having, as in this case, no insurable interest in the life of the latter, would be absolutely void. We quote the following passage from the opinion of the court, as delivered by Judge SELDEN, in the case of *Ruse v. The Mutual Benefit Life Insurance Company*, 23 N. Y. 516: "Our inquiry, therefore, is, whether at common law, independent of any statute, it is essential to the validity of a policy, obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life insured. A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are, at common law, valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong? Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against."

There are many authorities establishing that such policies are void, as contravening public policy, but it is unnecessary to make further reference to them. Now, if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable interest, upon what principle can he purchase such policy from another? If he purchase a policy as a mere speculation, on the life of another in whose life he has no insurable interest, the door is open to the same "demoralizing system of gaming," and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him by the underwriter. We are aware that the doctrine is held in New York, that if the policy is valid in its inception, it may be assigned to any one, whether he

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have any interest in the life of the assured or not. *St. John v. The American Mutual Life Insurance Company*, 13 N. Y. 31; *Valton v. The National Loan Fund Life Assurance Company*, 20 N. Y. 32. Such, also, seems to have been the view taken by the Vice-Chancellor in the case of *Ashley v. Ashley*, 3 Sim. 149. But the contrary doctrine is maintained in Massachusetts. *Stevens v. Warren*, 101 Mass. 564. The following passages, from the opinion of the court in the latter case, will show the scope and effect of the decision :

“ The plaintiff, as administrator of Barton, holds the proceeds of a policy of insurance upon the life of his intestate. The fund is assets in his hands for the benefit of one of the defendants as next of kin, after payment of debts, unless the other defendant is entitled to receive it by virtue of an assignment of the policy in the lifetime of the assured. * * * The only question to be determined in regard to the rights of the parties is, whether an assignment of the policy, by the assured in his lifetime, without the assent of the insurance company, conveyed any right, in law or in equity, to the proceeds when due. The court are all of the opinion that it did not. In the first place, it is contrary to the express terms of the policy itself, by which it is provided and declared that any such assignment shall be void. In the second place, it is contrary to the general policy of the law respecting insurance, in that it may lead to gambling or speculating contracts upon the chances of human life. The general rule, recognized by the courts, has been, that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life. Dewey K. Warren ” (the assignee of the policy) “ had no such interest, and could not legally have procured insurance upon the life of Barton. We understand the answer to deny that the policy was held by Warren as creditor and for his security ; and to assert an absolute right by purchase. The rule of law against gambling policies would be completely evaded, if the court were to give such transfers the effect of equitable assignments, to be sustained and enforced against the representatives of the assured. When the contract between the assured and the insurer is ‘ expressed to be for the benefit of ’ another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. Gen. Stats. ch. 58, § 62. * * * The same would probably be held in case of an assignment with the assent of the insurers. But if the assignee has no

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interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the assured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained." The decision in the above case is made to rest quite as much upon the second as the first ground stated, viz., that an assignment of a policy of life assurance to one having no interest in the life of the assured, where the assignment is a cover for a speculating risk, is void, as contrary to the general policy of the law respecting insurance.

After pretty mature consideration, we have concluded that the doctrine announced in the case cited from Massachusetts is the true doctrine on the subject. All the objections that exist against the issuing of a policy to one upon the life of another in whose life the former has no insurable interest, seem to us to exist against his holding such policy by mere purchase and assignment from another. In either case, the holder of such a policy is interested in the death, rather than the life, of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life. In our opinion, no one should hold a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another. In either case he is subject, in the language of Judge SELDEN, above quoted, to strong temptations to bring about the event insured against.

In this case there was but a simple purchase of the policy by Hazzard. He had no interest whatever in the life of the assured. He was a mere speculator upon the probabilities of human life. His contract of purchase was essentially a wager upon the life of Cone, and his interests lay in the payment of few or no intermediate annual premiums, and the early happening of the event which was to entitle him to the \$3,000. By his purchase he became interested in the early death of the assured. We are of opinion that the law will not uphold such purchase, and that the appellee acquired no right to the policy or to the sum secured thereby.

Life assurance policies are assignable, to be sure, but in our

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opinion they are not assignable to one who buys them merely as matter of speculation without interest in the life of the assured. What is such an interest in the life of another as will authorize one to insure his life, or purchase a policy upon his life, is a question not involved in the case, and we express no opinion upon it.

It has been suggested by the counsel for the appellee that our statute providing for the assignment of contracts embraces contracts of this description as well as others. This may be, but we do not think the statute contemplates the valid assignment of a contract to a party who, under the circumstances, in view of the general principles of law, is incapable of being an assignee of the contract.

In our opinion, the plaintiff below was not, on the facts shown, entitled to recover, and the motion for a new trial should have prevailed.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings not inconsistent with this opinion.

GILLASPIE, appellant, v. KELLEY.

(41 Ind. 153.)

Promissory note — blank — right of holder to fill.

The execution of a note, on its face payable at a bank, the place for the name of which is left blank, at a town named, authorizes the payee, before the maturity of the note, to insert the name of a particular bank at such town, in the blank space, so that, whatever limitation of authority may have been imposed by the maker on the payee, the note will be negotiable and governed by the law merchant in the hands of a *bona fide* indorsee.

APPEAL from the Clinton common pleas.

J. N. Sims, for appellant.

L. McClurg, for appellee.

BUSKIRK, J. It is alleged in the complaint that the appellee, James Kelley, on the 25th day of November, 1869, executed his

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certain promissory note to one Thomas H. Tobin, whereby he, for value, then and thereby received by him, promised to pay to the said Thomas H. Tobin or bearer, ten months after the date last aforesaid, the sum of \$100, with ten per cent interest thereon from the date aforesaid, without relief from the valuation or appraisement laws, payable at Carter, Given & Co.'s Bank, at Frankfort, a copy of which note, with indorsements, was filed with complaint; that afterward, on the day and date last aforesaid, the said Tobin sold and assigned said note, by indorsement in writing thereon, to Isaac Cook and Henry M. Baum, by their firm name of Cook & Baum, who, by the same firm name, sold and indorsed the said note in writing thereon to the plaintiff, who is now the *bona fide* owner, holder, and bearer of the same; that the said note is wholly due and unpaid. The prayer of the complaint was for judgment for \$150.

The defendant answered by the general denial, under oath.

The cause was, by agreement, submitted to the court for trial, and resulted in a finding for the defendant.

The plaintiff moved the court for a new trial, but the motion was overruled, and the plaintiff excepted.

The plaintiff appeals, and assigns for error the overruling of the motion for a new trial.

The first reason assigned for a new trial is, that the finding is not supported by the evidence. The evidence is in the record. There is not much conflict in the testimony of the several witnesses. The defendant was examined as a witness on behalf of the plaintiff. He admitted that he signed the note, but insisted that the note had been changed after he had executed it. Several other witnesses were examined in reference to the alleged alteration, and in our opinion, it is shown by a preponderance of the evidence that when the note was executed, the name of the bank was in blank, and that after its execution the words "Carter, Given & Co.," were inserted. The note read when executed, "payable at _____ bank, at Frankfort." It now reads, "payable at Carter, Given & Co.'s Bank, at Frankfort."

The question presented for our decision is, whether the alteration is so material as to affect the validity of the note. The solution of the question depends upon whether the note as it was when executed was commercial paper. If it was not, and the alteration gave it the character and immunity accorded to such paper, then

such alteration was material, and renders the note void, unless the payee of the note was authorized to fill the blank which was in the note when it was delivered.

It is provided by section 6 of "An Act Concerning Promissory Notes, Bills of Exchange, and Other Instruments," etc., approved March 11, 1861, that "notes payable to order or bearer in a bank in this State, shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover as in case of such bills." 2 G. & H. 658.

In this State, promissory notes payable in a bank in this State only, are placed upon the footing of bills of exchange, and governed by the law merchant. *Hunt v. Standart*, 15 Ind. 33.

The bank in which a promissory note is payable should be named in the note, so that the maker can know where he can pay the same upon maturity, and that a demand may be made whenever such demand is necessary. Edw. on Bills, 157. The note in the case in judgment, when it was signed by the maker, and by him delivered to the payee, did not contain the name of the bank where it was payable, and consequently was not governed by the law merchant. The insertion of the name of the bank in Frankfort, where the same was payable, was a material alteration, and rendered the note void, unless the payee was authorized to fill the blank by inserting the name of the bank. *Woodworth v. Bank of America*, 19 Johns. 391; *Clute v. Small*, 17 Wend. 238; *Nazro v. Fuller*, 24 Wend. 374.

We proceed to inquire whether the payee of a negotiable promissory note is authorized to insert the name of the bank, where the same has been left blank.

The maker of a promissory note stands upon the footing of an acceptor of a bill of exchange. *Nazro v. Fuller*, 24 Wend. 374; Chitty on Bills, 100-103; Byles on Bills, 173-177.

In our opinion, the rule is well settled, that if a person indorses or signs in blank paper or a note, and intrusts it to another, that he may raise money upon it, he authorizes that other person to fill all blanks which are necessary and proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be. *Holland v. Hatch*, 11 Ind. 497; *Spitler v. James*, 32 id. 202, and the authorities there cited. It is quite obvious to us, not only from the face of the note, but from the evidence of the appellee, that the maker of the note in question intended to make

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the same negotiable and governed by the law merchant. If the parties had intended to make an ordinary promissory note, and it had been complete as such when it was delivered to the payee, such payee would not have been authorized to insert words rendering it negotiable; and if there had been no blank in the note, and such words had been interlined, such interlineation would have put a purchaser upon inquiry. The note, when delivered, was not perfect and complete as a negotiable instrument governed by the law merchant. The payee had the right to make it perfect and complete by inserting the name of the bank where it was to be payable.

The case of *Spitler v. James, supra*, is very similar to the one under consideration, and is much in point. In that case the court say: "In this case it was proper to complete the note and render it negotiable by the law merchant, to make it payable at a bank. There was sufficient space for that purpose, and whatever question there may have been, while the note remained in the hands of a party having notice of the limitation on the authority of the maker imposed by the indorser, no defense can be based upon such limitation when the paper has passed into the hands of a *bona fide* holder. The principle which excludes defenses against instruments negotiable by the law merchant, in the hands of a purchaser before due, for value, and without notice of defects, would be violated by every exception introduced, and the value of such securities greatly lessened in the market."

In the case in judgment, the note was transferred by the payee before its maturity, in good faith, and for a valuable consideration. The signature of the maker was genuine; the note was in the usual form, and was perfect and complete on its face at the time when it was negotiated. It was in the possession of the payee, and the entire transaction was according to the ordinary and usual course of business. The appellee, being a *bona fide* holder, will be protected.

We are very clearly of the opinion that the finding was not supported by the evidence, and that the court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

GAGG, appellant, v. VETTER.

(41 Ind. 288.)

Negligence—communication of fire—proximate and remote cause—construction of chimneys in cities.

Plaintiff's building was destroyed by fire, caused by sparks from the chimney of defendant's brewery. Both buildings were situated in a populous part of a large and rapidly increasing city. In an action for damages, plaintiff alleged, first, that the chimney was improperly constructed, and, second, that the defendant was negligent in the use of the furnace and chimney. *Held* that, by reason of the location of the brewery, the defendant was bound to exercise a high degree of care and skill, both in the construction and in the use of the furnace and chimney, and that he was liable for any injury caused by a failure to use such care and skill.

The appellees, who were the plaintiffs below, by their complaint aver, that Anna Vetter was the owner, in her own right, of a certain lot in the city of Indianapolis, on which was erected a frame building, used by her husband as a furniture factory, and in which was a large amount of machinery, tools, fixtures, etc., the whole of the value of \$10,000; that the appellants were in the possession of the lots and premises contiguous to said factory, and did thereon erect buildings, chimneys, furnaces, smoke-stacks, and other structures, for the purpose of carrying on the business of brewing malt liquors; that appellees were using their said premises as a furniture factory at the time appellants erected their said works for the purposes aforesaid; that appellees' factory was covered with shingles, which appellants at the time well knew; that appellants, in the use of their buildings, furnaces, etc., consumed large quantities of fuel, and kept up large fires; that their said furnaces, flues, and chimneys were so located and built as to endanger the safety of appellees' property while using the same; "that said flues, furnaces, and chimneys of appellants were located and constructed in an insufficient, careless, and negligent manner, not being built of proper shape, nor of sufficient height or capacity, so that when the same were in use by appellants, the burning sparks, soot, coals, embers and cinders from said furnaces, flues, and chimneys, fell around and upon the buildings of appellees, of which appellants had notice; that on the 26th of April, 1867, while the appellants were

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using their furnaces, flues, and chimneys, and while keeping up and maintaining fires therein and thereunder, they did use, manage, and control the same in a negligent, reckless, and unskillful manner, and did make large fires therein of highly inflammable and dangerous material, so that, by reason of the improper, unskillful, insufficient, and dangerous location and construction of said flues, furnaces, and chimneys, and the careless, negligent, reckless, and unskillful use and management thereof by appellants, burning coals, soot, sparks, embers, and cinders were carried therefrom on to the factory buildings of appellees, so that said buildings, by the said negligence and recklessness of appellants, and without any fault of appellees, were fired and consumed."

Appellants demurred to complaint, and assigned for cause that the same did not state facts sufficient to constitute a good cause of action. Demurrer overruled. Appellants excepted. Answer of appellants, general denial. This cause was tried by jury. Trial of cause commenced January 3, and concluded January 27, 1870, when the jury returned a verdict, as follows: "We, the jury, find for the plaintiffs, and assess the damages of the plaintiff, Anna Vetter, at \$5,250.

The court, upon its own motion, instructed the jury in writing, as follows:

"First. The plaintiffs bring this suit for damages they alleged resulted to the property of plaintiff, Anna Vetter, from fire, communicated to it from the chimneys or smoke-stacks of the defendants' brewery, the plaintiffs alleging that from the dangerous location, and careless, defective construction of such chimneys or smoke-stacks, and careless and negligent use of said chimneys and stacks, in having great fires made of highly inflammable and dangerous material in the furnaces leading to said chimneys or smoke-stacks, so that fire was carried from the top of the same to the plaintiffs' building, whereby it was set on fire and consumed, without any fault or negligence on the plaintiffs' part. The defendants deny these allegations, which puts the plaintiff upon the proof of every material charge in her complaint.

"Second. Under the issues in this case, your first inquiry should be, was the building of the plaintiff, Anna Vetter, set on fire by sparks, coals, soot, embers, or cinders, carried from the chimneys or smoke-stack of the defendants' brewery? If the plaintiffs fail to establish this point, by a fair preponderance of evidence, then,

without further consideration, your verdict should be for the defendants. But should this point be established by such preponderance then you should go further and inquire, first, whether the fire was caused by the use of a chimney or smoke-stack, or both, which was dangerously located, or negligently or defectively constructed; or, second, if such chimney or smoke-stack was properly located and constructed, whether the fire was caused by the careless and negligent use by the defendants of such chimney or smoke-stack?

“Third. First, then, as I have suggested, you should inquire, was the fire caused by the use of a defectively constructed chimney or smoke-stack, or the furnaces or flues leading to the same, as named in the complaint? In investigating the question of the construction of the chimney or smoke-stack, you may properly take into consideration the action of the stack or chimney as to the delivery of fire or sparks at other times, whether such delivery was occasional or frequent. So, also, you may take into consideration the opinion of experts, persons who have experience in such matters, and also those who have had opportunities of observing the action of the chimney or stack in its ordinary action and operation. The law does not demand absolute scientific perfection in the construction of such works, but only that ordinary degree of skill in such construction which mechanics, versed in works of the kind, ordinarily used. But such works should be built with reference to the safety of adjoining premises, as well as to the mere convenience of the persons using them, taking into consideration the distance from the chimney to such adjoining premises, the height of the adjoining buildings, and all the other surrounding circumstances. This question of skill in construction extends to the construction of the flues and construction of the furnaces and flues, and the same question of ordinary skill applies. The law does not hold persons responsible for not making possible improvements, but only such as the experience of men versed in such matters recommends, and as are actually in existence.

“Fourth. Were, then, the flues and the chimney or smoke-stack constructed with the ordinary degree of care and skill I have named? If not, and the injury complained of resulted from such want of care and skill in construction, and, further, was the natural or probable consequence of such want of care and skill in construction, according to the ordinary experience of men, then the defendants will be liable. But if the chimney or stack, and the

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flues leading to the same, were constructed with ordinary care and skill, with a prudent regard to the safety of adjoining property, under the circumstances of distance and height, then you should inquire further, whether the burning of the plaintiffs' building was caused by the negligent and careless use of the chimney or stack, or the furnaces and flues communicating with it.

“Fifth. Your investigation of this point of negligent use is confined to the time charged in the complaint, that is to say, to the time of the origin of the fire complained of; this, as charged in the complaint, and as appears in evidence, was on or about the 26th of April, 1867. Even if there was negligent use at other times, before or after, yet the plaintiffs are none the less bound to sustain their charge of negligent use at this special time, by a fair preponderance of evidence, than if there had never, at any other time, been any negligent use.

“Sixth. The defendants were bound to use their furnaces, flues, and chimneys with ordinary care and skill. What constitutes ordinary care and skill depends upon the circumstances of the particular case; such care as a reasonable, prudent man would exercise upon the particular occasion would be such ordinary care as the law requires. This care depends upon the degree of danger to be avoided. Where the danger of injury to others is imminent, and the means of avoiding it wholly within the power of the party whose care is required, a higher degree of care is required than in circumstances of less danger, and a failure to use it would amount to a want of ordinary care under the circumstances. But unless, as I have previously suggested, the injury was the natural or probable consequence of the conduct upon the special occasion, according to the ordinary experience of men, the party would not be chargeable.

“Seventh. If you find, then, the plaintiffs' building was set on fire by the failure of the defendants to exercise ordinary care, as I have defined it, in the use of the chimney or stack, and the furnaces and flues connected therewith, then your verdict should be for the plaintiffs.

“Eighth. To entitle the plaintiffs to a verdict, there must be a clear, fair preponderance of evidence in support of their allegations, either that the fire resulted from the careless and unskillful construction of the chimney or smoke-stack, or the furnaces and flues connected therewith, or from the use of the chimney or stack by

the want of ordinary care and skill, as I have defined, or from both these causes combined.

“Ninth. If the evidence is evenly balanced, in your judgment, or if it preponderates in favor of the defendants, then your verdict should be for the defendants.”

The appellants, at the time of giving said instructions, and before the retirement of the jury, as to the giving of each of said instructions objected and excepted.

Appellants moved the court to set aside the verdict and grant a new trial, and assigned the following grounds and causes therefor: [Fourteen causes were set forth.]

Motion overruled, and excepted to by appellants.

Judgment rendered on the verdict, to which the appellants at the time excepted and objected.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, J. Hanna, and F. Knefler, for appellants.

A. G. Porter, B. Harrison, W. P. Fishback, and C. C. Hines, for appellee.

BUSKIRK, J. [After stating facts as above.] There are sixteen assignments of error. The first fourteen assignments are mere repetitions of the reasons for a new trial, and are embraced by the fifteenth, which is based upon the action of the court in overruling the motion for a new trial. The sixteenth assignment presents no question in this case that is not presented by the fifteenth assignment of error. The only question presented for our decision is, whether the court erred in overruling the motion for a new trial.

The plaintiffs below, and the appellees here, base their right to recover in this action upon two grounds, and they are:

First. That the flues, chimneys, and furnaces in appellants' brewery, being near to appellees' factory building, were not built in proper shape, nor of sufficient height or capacity, causing burning coals, soot, cinders, sparks, and embers, to be carried therefrom upon the roof of the factory, whereby it was burned and destroyed, and,

Second. That appellants were negligent in the use of the furnaces, flues, and chimneys, by making large fires therein, of highly inflammable and dangerous material, so that the sparks, embers,

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etc., passed from the chimney to the roof of the factory, burning and destroying it.

The learned counsel for appellants have, in their brief, maintained that the appellees cannot recover upon the first ground stated, for the following reasons:

“If, in the erection of large and costly structures, important to the development of the country, there arise questions involving philosophical and mechanical principles upon which men of skill and experience differ—such as the proper sizes of furnaces, capacities of flues, and height of chimneys—can it be said to be an act of carelessness or negligence, or wrong, that either or any well supported theory and plan be adopted? We submit, as a question of law, that in such case there can be no liability, even if the decision be unfortunate. This doctrine is essential to the development of the mechanic arts in our country. In such cases the courts will not allow men of enterprise to be destroyed by verdicts, in the absence of willful disregard of the rights of others.

“We submit further, that in the erection of useful and difficult structures, the parties cannot be charged with negligence or wrong, if they employ the most skilled labor they can command, even if the work prove defective; for they have exercised all the care and diligence possible, and a verdict cannot stand in hostility to this proposition. The construction of the furnaces under the large kettles, and the flues connected therewith in appellants’ brewery, was a work of much difficulty, and but few mechanics had the skill to accomplish it. The appellants secured the best workmen they could obtain.”

The position of counsel for appellants, as we understand it, is, that if men of skill and experience differ as to the proper and best mode and plan of erecting large and difficult structures, such as the proper sizes of furnaces, capacities of flues, and heights of chimneys, the person who adopts any well supported theory or plan cannot be charged with carelessness, negligence, or wrong, although the decision made was unfortunate, and the plan adopted was not the best which might have been adopted; and that if such person employs, in the construction of such structures, the most skilled labor which he can command, he cannot be charged with negligence or wrong, although the work may prove defective.

In support of the above position, we have been referred to the following authorities: Shearm. & Redf. on Negligence, 506; *Weight-*

man v. *The Corporation of Washington*, 1 Black, 39; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Lapham v. Curtis*, 5 Vt. 371; *The P., Ft. W. & C. Railway Co. v. Gilleland*, 56 Penn. St. 445.

The law is stated as follows by Shearman and Redfield: "If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable, even though, if he had used them, the injury would certainly have been avoided. So, if he uses all the skill and diligence which can be attained by reasonable means, he is not responsible for failure. * * * * * Regard is to be had, in judging of negligence, to the growth of science and the improvement in the arts which take place from generation to generation; and many acts or omissions are now evidence of gross carelessness, which, a few years ago, would not have been culpable at all, as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence." *Shearm. & Redf. on Negligence*, 5.

In our opinion, the above authority does not support the position assumed. The law is stated to be: "If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable."

The case of *Weightman v. The Corporation of Washington*, *supra*, was an action to recover damages for personal injuries received by the plaintiff by the falling of a bridge which the city was bound to maintain. The defense was, that the bridge was built by skillful men, and upon a plan approved by scientific persons, and that the corporation had no notice of any defect, or of its being out of repair. The case mainly turned upon whether the corporation was bound by its charter to keep the bridge in question in repair, and whether the corporation had notice that it was out of repair. The court, after enumerating certain powers which are granted to municipal corporations, which are undefined and discretionary, say: "But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly defined duty is enjoined in consideration of the privileges

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and immunities which the act of incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance."

The case of *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210, was a case where fire was communicated by an engine to a wood-shed of the company, and from that to the plaintiff's house. It was held that the damages were too remote, and that there could be no recovery.

But the court lays down a principle of law that has some bearing on the present case. It is said: "So if an engineer on a steamboat or locomotive, in passing the house of A., so carelessly manages the machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or steamboat proprietors are liable to pay the value of the property thus destroyed. *Field v. The N. Y. C. R. R. Co.*, 32 N. Y. 339. Thus far the law is settled and the principle apparent." The distinction between that case and the case at bar is clearly put by the court in this further extract: "I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. * * * But that the fire should spread and other buildings be consumed, is not a necessary or an usual result."

The case of *Lapham v. Curtis*, *supra*, was an action by the owners of a furnace which was situated below a mill-dam and pond owned by the defendant, to recover damages for injuries done to the furnace by an overflow of water, which was alleged to have been caused by the defective, negligent, and unskillful manner in which such dam had been constructed, and in which repairs thereto

had been made. The court held that the owner of the dam had a prescriptive right to maintain such dam, and that he had the right to make repairs thereto, and then proceeded to define the care and diligence which he was required to use in making such repairs, as follows: "But the defendant was subject to the maxim, *sic utere tuo ut alienum non lædas*. To comply with this requisition of the common-law, it was the duty of the defendant to have used ordinary care and diligence in making repairs to his dam, or in drawing off the water from his pond, to prevent injuries to the plaintiff's furnace. If the defendant did not use this care and diligence, he was guilty of negligence and liable for consequential damages; but he was not liable for inevitable accidents."

The case of *The Pittsburg, Fort Wayne & Chicago Railway v. Gilleland*, 56 Penn. St. 445, was an action by the appellee, the owner of land through which appellant's road passed, to recover damages for an injury caused to his land by the continuance, after notice, of an insufficient culvert, so unskillfully and negligently constructed by the former proprietors of the road as not to vent all the water that flowed down the channel over which it was built, in the ordinary seasons of high water. The action was founded upon the duty of a railroad company to construct its works with proper skill and care, and with a due regard to the features of the ground over which its road passes.

It was contended by the appellant that the injury from an insufficient culvert fell within the special authority given for the appropriation of the land and the damages arising therefrom. The court, after considering and deciding such question against the appellant, proceeded to consider and determine the common-law liability of the railroad company. The court said: "And on this point there is no doubt, upon general principles and adjudicated cases. The entry of a company to build its railroad being lawful, it stands as if it were on its own ground, and the maxim applies, *sic utere tuo ut alienum non lædas*. It should so perform its act as not to carry over its injurious consequences beyond the hurt it may lawfully inflict. It is said in Hilliard on Torts, 125, and numerous examples are there adduced, that acts innocent and lawful in themselves may become wrongful when done without a just regard to the rights of others, and without suitable reference to the time, place or manner of performing them. The test of exemption from liability for injury arising from the use of one's own property is

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said to be the legitimate use or appropriation of the property in a reasonable, usual, and proper manner, without any unskillfulness, negligence or malice. *Carhart v. Auburn Gas-light Co.*, 22 Barb. 297. The distinction is vital, says THOMAS, J., in *Rockwood v. Wilson*, 11 Oush. 221, for nothing is better settled than that if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence. But lawful acts may be performed in such a manner, so carelessly, negligently, and with so little regard to the rights of others, that he who, in performing them, injures another, must be responsible for the damage. *Burroughs v. The Housatonic R. R. Co.*, 2 Am. Railroad Cas. 35."

While the foregoing authorities have an important bearing upon the principal question in the case, they do not in our judgment, support the positions assumed by counsel for appellants.

Addison on Torts, 242, states the law as follows: "Whenever it is practicable to adopt precautions that will render damage by fire from a furnace 'next to impossible,' a failure to adopt those precautions will be negligence. Where a spark of fire from the chimney of a locomotive engine on a railroad fell on the thatch of a cart-lodge, and set it on fire, and the fire communicated to several other farm buildings, and totally destroyed them, it was held that the very occurrence of the disaster was, *prima facie*, proof of negligence on the part of the company and their servants having the management of their engine, rendering it incumbent on them to show that every possible precaution had been taken to prevent the escape of sparks."

The following authorities are referred to by the author: *Piggot v. Eastern Counties R. W. Co.*, 3 C. B. 229; *Aldridge v. Great Western Railway Co.*, 3 Man. & G. 515; *Fremantle v. London and North Western Railway Co.*, 10 C. B. N. S. 89; 31 Law J. C. P. 12; 2 F. & F. 337; *Vaughan v. Taff Vale Railway Co.*, 3 H. & N. 743; 28 Law J. Exch. 41; 29 id. 247; 5 H. & N. 679.

In *Fremantle v. The London and North Western Railway Co.*, *supra*, it was said: "It must therefore, be considered what would be negligence on the part of the defendants, for the consequences of which they ought to be held responsible. That, as to that, the defendants, in the construction of their engines, were bound, not only to employ all due care and all due skill for the prevention of

mischief occurring to the property of others, by the emission of sparks, or any other causes, but they were bound to avail themselves of all the discoveries which science had put in their reach for that purpose, provided that they were such as, under the circumstances, it was reasonable to require them to adopt."

In *Vaughan v. Taff Vale Railway Co.*, *supra*, it was held by the exchequer chamber, that a railway company is not responsible for an accidental fire caused by a spark falling from one of their engines upon premises adjoining the railway, if they have taken every precaution that science can suggest to prevent injury.

It was held, in *The Illinois Central R. R. Co. v. McClelland*, 42 Ill. 355, that a railroad company, by failing to provide the most approved appliances for arresting sparks from their engines, becomes liable for all casualties occasioned thereby.

In *Fero v. The Buffalo, etc. R. R. Co.*, 22 N. Y. 209, it was said: "The train was running at the usual rate of speed, in the open country, and it was shown that the engine was of the most approved construction; the spark-arresters of the best pattern; and that a suitable police had been provided upon the road for the purpose of following trains and looking after fires." These circumstances were held sufficient to discharge the defendants from liability for the damages which were supposed to have been occasioned by flying sparks from the engine.

In *Kelsey v. Barney*, 12 N. Y. 425, JOHNSON, J., in speaking of the degree of care required, says, in his opinion, that under some circumstances, a very high degree of vigilance is demanded, even under the requirements of ordinary care. "Where," he says, "the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight."

In *Johnson v. The Hudson River R. R. Co.*, 20 N. Y. 65, the court held, that "they were bound to exercise the utmost care and diligence; and for the purpose of avoiding accidents, endangering property and life, were bound to use all the means and measures of precaution that the highest prudence could suggest, and which it was in their power to employ."

In *Hegeman v. The Western Railroad Corporation*, 13 N. Y. 9, the company was held liable for injury resulting from the breaking of

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the axle of the car. On the part of the defendant, it was proved that the track of the railroad was in good order, and that the train was manned by a competent and skillful conductor, engineer, and brakemen; that at the time of the accident, the train was going at the rate of from twenty-five to thirty miles per hour, being the ordinary speed of passenger trains; and when the accident occurred, the employees of the defendant were at their appropriate places, and the train was stopped as soon as possible after the axle broke. The conductor, who was in charge of the train at the time, testified that the car which broke had been run upon the road about sixteen months; that it was new when it came into the train; that it was built at Springfield, by The Springfield Car and Engine Company; that it was an excellent car, and was used only during the summer months, as they did not wish to deface it by putting stoves in it.

It was very earnestly insisted by learned counsel in the Court of Appeals, that under the circumstances stated the company was not liable; but the judgment of the court below was affirmed. The court say: "It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation on the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in this particular instance. If to this extent they are not responsible, there is no security for individuals or the public."

The case of *The Terre Haute, etc., R. R. Co. v. McKinley*, 33 Ind. 274, was an action by the appellee against the appellant, to recover damages for overflowing his lands, which was alleged to have been caused by an insufficient and defective culvert upon the lands of the plaintiff.

The defense of the company was placed upon the ground that the new culvert was necessary to the safety of passengers and prop-

erty passing over the road, and that it was built with care, skill, and prudence. The court below refused to so charge the jury. This court, for that error, reversed the judgment. The court say: "The jury ought to have been plainly charged, so far as the injury from overflowing the lands of the plaintiff by the construction of the embankment and abutment was concerned, that if they found, from the evidence, that the embankments and abutments were necessary to the safety of passengers and property passing over said road, and that it was built, constructed, and erected, with care, skill, and prudence, not only as to the safety of persons and property passing over the road, but also for the protection and safety of the property holder, then the finding on that issue should be for the defendant."

In the above case, the main point of controversy was, whether the aperture was large enough to carry off the water. Upon that point a number of scientific witnesses were examined, who differed widely in their views. There was also much evidence as to the skill and experience of the workmen who put up the work. In our opinion, this court placed its decision upon reasonable and solid ground, and that was, that if the new structure was necessary for the safety of passengers and property passing over the road, and if the same was built with care, skill, and prudence, and with a due regard to the protection and safety of the property holder, the company was not liable, and that these questions should have been submitted to the jury.

In our opinion, it would be a very unsafe and dangerous rule to hold that a builder might adopt any well-supported theory as to the proper and best plan and mode of constructing large and difficult structures, and that if he employed workmen of skill and experience, he could not be charged with carelessness or negligence, if such plan should prove defective and such work should be unskillfully performed.

We know, from experience and observation, that men of skill and experience entertain radically different views upon questions of science and skill, and support their conflicting theories with ingenuity and plausibility, even after experience and observation have demonstrated their falsity and fallacy; and in like manner we know that some workmen of undisputed reputation for experience and skill perform their work in a careless and unskillful manner.

The appellants' brewery was built in a populous part of a large

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and rapidly increasing city. The property of the appellees, which was destroyed by the fire, was there at the time the brewery was constructed. This imposed upon the appellants the necessity of exercising a higher degree of care and diligence in the construction and management of their brewery than if it had been located in the country, or in a part of the city where there were no houses in its immediate vicinity. A mere difference of opinion among men of science and experience as to the best plan to construct the chimney, furnace, and flues, did not justify the selection of any well-supported theory without further inquiry, for they were bound to use all due care and vigilance to ascertain which theory was correct and which was incorrect; and, for that purpose, they were bound to avail themselves of all the discoveries which science and experience had put within their reach. While the law does not require absolute scientific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as near as may be, the best plan for the structures; and it requires, not only that skillful and experienced workmen shall be employed in their construction, but that due skill was exercised in the particular instance.

We are aware that a higher degree of care and diligence is required on the part of common carriers toward passengers than in ordinary cases, and some of the above cases may have laid down a rule of strictness that would not be applicable to the case under consideration. In the present case, the defendants were required, in the adoption of the plan and in the construction of their chimney, flues, and furnaces, to exercise ordinary care, prudence, and foresight; that is, such a degree of care and attention as experience has found reasonable and necessary to prevent injury to others in like cases.

This is what is understood by the terms, "ordinary care and diligence."

The liability of the defendants in this action was placed upon this ground. The court below instructed the jury that, "the law does not demand absolute scientific perfection in the construction of such works, but only that ordinary degree of skill in such construction which mechanics, versed in works of the kind, ordinarily used."

It is also maintained by counsel for appellants that the appellees ought not to recover in this action, from the circumstance that no such action as the present has ever been sustained in any of the

courts of this country, and in support of such position, quote the following language from the opinion of the court in the case of *Ryan v. The New York Central R. R. Co., supra*. "That the defendant is not liable in this action may also be strongly argued, from the circumstance that no such action as the present has ever been sustained in any of the courts of this country, although the occasion for it has been frequent and pressing. Particular instances are familiar to all, where such claims might have been made with propriety. The instance of the Harpers, occurring a few years since, is a striking one. 23 N. Y. 441. Their large printing establishment, in the city of New York, was destroyed by the gross carelessness of a workman, in throwing a lighted match into a vat of camphene. The fire extended, and other buildings and much other property was destroyed. The Harpers were gentlemen of wealth, and able to respond in damages to the extent of their liability. Yet we have no report in the books, and no tradition, of any action brought against them to recover such damages."

The above quoted language is not applicable to the present case, for the reason that the fire, which came out of the defendants' chimney, dropped upon the property of the plaintiffs and set it on fire, while in that case the wood-shed of the company was set on fire by sparks from the engine, and the plaintiff's house, situated at a distance of one hundred and thirty feet, took fire from the heat and sparks and was consumed. The ruling of the court in that case was placed upon the ground that the damages sustained by the plaintiff were too remote. HUNT, J., speaking for the court, says: "My opinion, therefore, is, that this action can not be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote." In further proof of the fact that the language quoted does not apply to the present case, we again quote from the above case the following language: "So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed."

But conceding that the above language applies to the present case, the question arises as to the meaning to be attached to the

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expression, "No such action as the present has ever been sustained in any of the courts of this country." If by the phrase, "no such action," is meant no action founded upon, and governed by, any of the known and well-settled principles of the law, then the objection is entitled to great weight and consideration, for the courts of this country do not possess the power to make law, but their functions are confined to the exposition of the law as it is, and its application to the facts of each new case, as it shall arise in the administration of justice. The law consists of rule, of reason, of legal principles, and not of mere points as presented in particular cases. If, however, by the words, "no such action," is meant that no action is based upon the same identical state of facts, then the question ceases to be one of difficulty or importance.

The wide and marked difference between the general principles of the law, and the points as presented in particular cases, is stated with great accuracy, clearness, and force, by Mr. Chief Justice SHAW, in *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray 263, where he says: "It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances. * * * The consequence of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice and policy, which underlie the particular rules of the common-law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If

these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore" (applying these observations to the case before the court), "although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common-law, subject only to such modifications as new circumstances may render necessary and mutually beneficial."

We proceed to inquire whether the facts and circumstances of the case before the court bring it within any of the well-settled principles of the common-law; and in determining such question we will be guided by elementary principles and judicial expositions.

There is an elementary and fundamental principle of law, which is based upon, and is coeval with, the right to own and control property, that a man must so use his own rights and property as to do no injury to those of his neighbor; for in all civil acts the law does not so much regard the interest of the actor as the loss and damage of the party suffering. Saund. on Negligence, 61.

The above is one of the broad and comprehensive principles of the law spoken of by SHAW, C. J., *supra*, and there have been in England and in this country many judicial expositions of such principle, making an application thereof to the facts and circumstances of particular cases, thus establishing precedents which become a rule of law for future cases.

It has accordingly been held, that every person who occupies land, who allows wells or mining shafts to remain on his land unguarded and unprotected, is responsible in damages to all persons who sustain injury from falling into them, provided they were lawfully traversing the land on which the shaft or well existed, and fell into it without any negligence or misconduct on their part, but if, however, they were at the time trespassers on the land, they would not be entitled to maintain the action. *Hardcastle v. The South Yorkshire R. W. Co.*, 4 H. & N. 67; 28 L. J. Exch. 137; *Blyth v. Topham*, 4 Cro. Jac. 158; *Hounsell v. Smyth*, 7 C. B. N. S. 731; 29 L. J. C. P. 203; *Gautret v. Egerton*, 36 id. 191; *Cerby v. Hill*, 4 C. B. N. S. 556; 27 L. J. C. P. 318; *Gallagher v. Humphrey*, 6 Law Times, 684; *Groucott v. Williams*, 4 Best & S. 149

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32 L. J. Q. B. 237; *Howland v. Vincent*, 10 Metc. 371; *Bush v. Brainard*, 1 Cow. 78.

In *Lee v. Riley*, 18 C. B. N. S. 722; 34 L. J. C. P. 212; it appeared that through the defect of a gate, which the defendant was bound to repair, his horse got out of his farm into an occupation-road, and strayed into the plaintiff's field, where it kicked the plaintiff's horse, and it was held that the defendant was liable for the trespass by his horse, and that it was not necessary, for the maintenance of the action, to prove that the defendant's horse was vicious, and that the defendant was aware of it; also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable.

Gale on Easements, 335, in speaking of the support of land, says: "If every proprietor of land was at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the land of his neighbors, it is obvious that the withdrawal of the natural support would, in many cases, cause the falling in of the land adjoining. * * * The negation of this principle would be incompatible with the very security for property, as it is obvious that if the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone."

It has been held, that if the owner of a house which is being pulled down, conducts the work in so irregular, negligent, and improper a manner that injury is produced thereby to the adjoining house, he will be liable to make compensation in damages for the consequences of his want of caution. *Walters v. Pfeil*, Moody & M. 362; *Dodd v. Holme*, 1 Ad. & E. 493.

It has been held in many cases, that a person engaged in building is responsible for injuries caused by defective scaffolding, where due care has not been used. Hay on Accidents and Negligence, 121.

It has been repeatedly held that the owners of coal pits, blast furnaces, rolling mills, and manufactures generally, are liable for injuries caused by defective machinery, where proper care has not been used. Hay on Accidents and Negligence, 130, *et seq.*

It was held in *Hewey v. Nourse*, 54 Me. 256, that "every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable man-

ner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet if he is guilty of negligence in taking care of it, and it spreads and injures the property of another, in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care, on the part of the defendant."

To the same effect are the cases of *Bachelder v. Heagan*, 18 Me. 32; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 11 Metc. 460.

In *Teall v. Barton*, 40 Barb. 137, the defendants were engaged, under a contract with the State authorities, in removing a sunken boat from the channel of the canal, by means of a steam dredging machine, in the vicinity of the plaintiff's buildings, using wood for fuel, without any spark-catcher or screen upon their smoke-stack. A high wind blowing the sparks and cinders to and over the farm buildings, the defendants were notified by the plaintiff's agent or servant of the danger to such buildings; notwithstanding which, the defendants continued to use their dredge, keeping up the fire thereon without putting on a spark-catcher, or using any extra precaution to prevent injury from fire. The buildings of the plaintiff being consumed by fire communicated to a pile of straw by sparks, it was held that the defendants were guilty of carelessness and negligence, and were liable for the damages occasioned by the fire.

The case of *The Steamboat New World v. King*, 16 How. (U. S.) 469, was an action for damages occasioned by the explosion of a boiler, alleged to have been caused by the want of care and skill on the part of the persons in charge of the vessel. The court say: "That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves.

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We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property."

It has been held frequently that the owners of steamboats are liable for the destruction of property by fire caused by sparks from their smoke-stacks, where due care has not been used.

It has been so repeatedly decided in England and in this country, that railroad companies are responsible for the destruction of property by fire caused by sparks or coals of fire from their engines, where all reasonable precautions have not been used to prevent such injury, that we would not be justified in attempting to cite authorities in support thereof. The citation of such cases would cover several pages.

The principles of law enumerated in the foregoing analogous cases apply with equal force and directness to the present case, and fix and determine the liability of the appellants. We are, therefore, of the opinion that the appellants are liable in damages to the extent of the injury sustained by the appellees, if it was proved upon the trial, either that ordinary care and diligence were not employed in the construction of their chimney, furnaces, and flues, or that they were guilty of negligence in the management thereof.

Appellants' counsel contend that there is no evidence of the use of any dangerous or improper fuel. Counsel for appellees admit that there was no witness who testified to the particular kind of fuel used in the furnace on the morning in question, but they maintain that there was evidence from which the jury had the right to conclude that dangerous and improper fuel had been used; they contend that it was abundantly proved that smoke, sparks, and flame were seen coming from the chimney top; that such evidence, when considered in the light of the testimony of the experts, conclusively demonstrated either that improper fuel had been used, or that the chimney and flues had been unskillfully built, for the reason that all the scientific witnesses testified and agreed that a

well-constructed chimney, in which safe fuel only was used, would not send out sparks and fire from the top.

While positive affirmative testimony as to the kind of fuel used would have been more satisfactory and convincing, the jury may have found, from the effects produced, that dangerous and inflammable fuel was used.

Upon the ground, namely, the negligent and improper construction of the furnace and chimney, appellants' counsel concede that there was evidence upon which the verdict might rest, but they claim that the weight of the evidence is the other way. They attempt to take this case out of the rule of this court against determining questions of the weight of evidence, by the suggestion that the question is "dependent for its solution upon philosophical principles and mechanical skill and judgment." This may be true to an extent, but these principles and that skill and judgment are the subject of evidence, and this court is as much bound to respect the conclusions of a jury in this class of cases as in any other.

The question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence is conflicting.

Field v. New York Central Railroad, 32 N. Y. 339; *Fremantle v. London, etc., R. W. Co.*, *supra*; *Greenleaf v. The Illinois, etc., R. R. Co.*, 29 Iowa, 14; *Jenkins v. Little Miami R. R. Co.*, 2 Disney, 49; *Eagan v. Fitchburg R. R. Co.*, 101 Mass. 315; *Maloy v. The New York Central R. R. Co.*, 58 Barb. 182; *Belton v. Baxter*, 2 Sweeny (N. Y.) 339; *The Pennsylvania Canal Co., v. Bently*, 66 Penn. St. 30.

The opinion of the court, in the case of *Field v. New York Central Railroad*, *supra*, is so much in point, that we have concluded to make an extended quotation therefrom. The court say: "But the defendants now insist that, although they may have caused the injury, the nonsuit should have been granted for the reason that no cause of negligence on their part was made out. If I understand their position correctly, it is, that in this class of cases it is incumbent upon the party injured, if he would make a *prima facie* case, to show affirmatively that there was something improper in the construction of the defendant's engines, or that they were not in order, or were insufficiently or improperly managed. This is not the rule. Undoubtedly, the burden of proving that the injury

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complained of was caused by the defendant's negligence was upon the plaintiff. To show negligence, however, it was not necessary that he should have proved affirmatively that there was something unsuitable or improper in the construction, or condition, or management of the engine that scattered the fire communicated to his premises. It often occurs, as in this case, that the same evidence which proves the injury shows such attending circumstances as to raise a presumption of the offending party's negligence, so as to cast on him the burden of disproving it. Then the injury was caused by dropping from the defendant's engines coals of fire. The fact that the sparks or coals were scattered at all upon their roadway, in such quantities as to endanger property on abutting premises, raised an inference of some weight that the engines were improperly constructed or managed. But this was not all. It was conceded and proved that if the engine is properly constructed, and in order, no fire of any amount will escape to be distributed along the track. It was shown that four or five of the defendants' engines that passed the plaintiff's farm, were defective in apparatus to avoid scattering of fire, and although the others were fitted with the necessary improvements to retain it, and in this respect there was no want of care on the part of the company, yet that constant oversight was required, and if they scattered fire it was because they were out of order. It was legitimately to be inferred from these facts that the scattering of coals of fire from the defendants' engines which were found upon their track, and which produced the injury, was the result either of defectiveness in the machinery or neglect in repairing it. There was enough, therefore, in the evidence to justify a submission of the question to the jury, whether the injury complained of was caused by the negligent conduct of the defendants."

In the summing up of the judge to the jury in the case of *Fremantle v. London, etc., Railway Co.*, 10 C. B. 89, he said: "The question is, whether, notwithstanding the evidence of impossibility which has been adduced by all that numerous company of witnesses, do you nevertheless think that the plaintiffs have established the fact that the fire could not be accounted for upon any other supposition than that it must have come from the engine. If you do, then I must repeat that all this evidence that is so powerful on the first question is cogent against the defendants upon the second, because it then goes to show that the fire was occasioned by an

engine which was so perfect in its quality that nothing could have caused the emission of sparks except negligence, either in the condition of the engine or in the way in which it was worked by the driver; and therefore the evidence then becomes cogent the other way."

May it not be said in the case at bar, with equal force, that when the jury once adopted the conclusion, from the evidence, that sparks from defendants' chimney did fire plaintiffs' house, the evidence that this was a well-constructed chimney became cogent against defendants upon the question of a negligent use. The first fact being proved, the more perfectly the structure of the work is justified the more clearly its misuse is shown.

There was much evidence on both sides on the question of the skillful and careful construction of the chimney, the furnace and flues. The evidence was conflicting, and, therefore, the question of fact was properly submitted to the jury. The jury was correctly instructed as to the law applicable to the case. In such a case, we cannot disturb the verdict. To do so would be to usurp the functions of the jury.

It is also claimed that the court erred in the admission of testimony to prove that smoke, sparks and flame had been seen coming out of the top of the chimney at other times than on the occasion of the injury complained of, and, in instructing the jury, that it was proper for them to consider and weigh such evidence in determining whether the chimney and smoke-stack had been properly constructed.

That such evidence was properly admitted, and that the instruction complained of contained a correct exposition of the law, is too well settled to admit a doubt. The question should no longer be regarded as an open one. *Piggot v. The Eastern Counties Railway Co.*, 10 Jur. 571; *Aldridge v. The Great Western Railway Co.*, 3 Man. & G. 515; *Sheldon v. The Hudson River R. R. Co.* 14 N. Y. 218; *Field v. New York Central Railroad*, 32 id. 339; *Ross v. Boston, etc., R. R. Co.*, 6 Allen, 87.

In *Field v. New York Central Railroad*, *supra*, the court say: "The remaining exception was to the reception of testimony, that coals of fire had frequently been found on defendants' track, or been seen to have dropped from their engines in passing the plaintiff's farm, on other occasions than that of the fire complained of. The competency of this species of proof was settled in the case of

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Sheldon v. The Hudson River R. R. Co., 4 Kern. 218. It was said in that case, in the leading opinion, the evidence 'had a bearing upon both branches of the case which the plaintiff undertook to establish. It not only rendered it probable that the fire was communicated from the furnace of one of defendants' engines, but it raised an inference of some weight, that there was something unsuitable and improper in the construction of the engine which caused the fire.'"

Finally, it is earnestly insisted by counsel for appellants that the verdict is not supported by the evidence. But counsel for appellees contend that all the evidence is not in the record. We will state the point in the language of the counsel. They say: "There is a sufficient reason, however, aside from the rule referred to, why this court cannot consider the question of the weight of the evidence, on this or the other branches of the case. The evidence is not all here. The jury, after the conclusion of the oral evidence, was, at the request of the appellants, conducted by a bailiff to inspect the premises concerning which evidence had been given, and particularly the furnaces, chimney, etc., of appellants' brewery. What they saw, or what impressions were made upon their minds by what they saw, this court cannot know.

"This inspection may have modified the views of the jurors as to the decisive facts in the case. The furnaces may have been in operation, and their defects may have been demonstrated in the very view of the jurors. Of all this, the court here can know nothing. In the case of *The Evansville, etc., R. R. Co. v. Cochran*, 10 Ind. 560, the court refused to consider a question as to the sufficiency of the evidence to support the verdict, on the ground that all the evidence was not in the record; the jury having been sent to inspect the premises, and there being nothing in the record to show the effect of the examination upon their minds. There seems to be good reason in this, and if the ruling is adhered to, there is an end of the appellants' objections."

The objection is not well taken. The case of *The Evansville, etc., Railroad Co. v. Cochran*, *supra*, was in express terms overruled by this court in the case of *The Jeffersonville, etc., Railroad Co. v. Bowen*, 40 Ind. 545.

We, therefore, hold that the evidence is all in the record. There are eleven hundred and forty-five pages in the record. The appellants have furnished us with a printed abstract of the evidence,

which covers sixty-eight pages. We have read and considered with great care such abstract, and the substance of the entire evidence, and we have read in full the testimony of all the witnesses to whom our attention has been specially called by counsel for appellant. We have had the case under advisement and consideration for a long time. We have given the questions involved a patient and careful consideration, and entertained no doubt that we are required by the law and the well-settled practice of this court to affirm the judgment.

The evidence is plainly, palpably, and directly conflicting. The verdict of the jury depended upon the weight which should be given to the testimony of the two sets of witnesses. The testimony could not be reconciled and harmonized so that it might all stand. The jury were compelled to believe the one set and disbelieve the other, except the scientific witnesses, who, doubtless, honestly differed in their views.

Upon such a statement of facts we cannot disturb the verdict. *The Madison and Indianapolis Railroad Co. v. Taffe*, 87 Ind. 861.

PRICE V. BAKER.

(41 Ind. 572.)

Election—Disqualification of one candidate—Different officers in same board

At an election of commissioners, where it was doubtful as to whether two or three vacancies existed, A. and B. were elected to fill the two conceded vacancies, and C. was also declared elected "in case a vacancy is found to exist." C. thereupon applied for a mandamus to compel the delivery to him of a commission on the ground that A. was disqualified. *Held*, that C. was not entitled to the office, even if A. was disqualified.

APPEAL from the Marion circuit court.

S. Claypool and *W. R. Harrison*, for appellant.

C. A. Ray and *J. M. Davidson*, for appellee.

DOWNEY, J. This was a proceeding by mandate, instituted by the appellant against the appellee, as governor of the State, to

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compel him to issue to the appellant a commission as a director of the state prison at Jeffersonville. The governor made return to the writ, and the appellant demurred to the return, for the reason that it did not state facts sufficient to constitute a defense to the action. This demurrer was overruled, and the plaintiff excepted. A reply by general denial was filed by the plaintiff, and the cause was tried by the court; there was a finding for the defendant; a motion for a new trial, made by the plaintiff, for the reason that the evidence was not sufficient to sustain the finding of the court, was overruled, and final judgment was rendered for the defendant.

The errors assigned are in overruling the demurrer of the plaintiff to the return, and in refusing to grant him a new trial.

It is conceded by counsel for the appellant that, whether the case is to be decided upon the demurrer to the return, or upon the motion for a new trial, the question to be determined is the same. The facts of the case, so far as necessary to be stated for a correct understanding of the question involved, can be stated without reciting the pleadings at length. By the act of February 5, 1857, 1 G. & H. 464, the board of directors of the prison consists of three members; and at the first election under the act, two of the number were to be elected for four years, and one for two years; and at the expiration of each full term, successors were to be elected for a term of four years. The first election under the act was held in 1859. If a vacancy occurred before the expiration of any term, it was to be filled, and such incumbent would serve until the expiration of the term of the person whose vacancy he filled. *Baker v. Kirk*, 33 Ind. 517. At the session of the legislature in January, 1871, the board of directors consisted of Robert S. Heiskell, who had been elected by the legislature in April, 1869, at the special session, to complete the term of M. T. Ghee, who was elected in January, 1867; George C. Clark, who had been appointed in October, 1870, by the governor, to serve out the unexpired term of Fletcher M. Meredith, who was elected in January, 1867; and William W. Curry, who was elected in January, 1869, and who consequently had two years yet to serve.

It thus appears, and the fact is conceded by the counsel for the appellant, that at the session of the legislature in 1871, there were two, and only two, directors to be elected. The facts as agreed upon, and used as evidence on the trial of the cause, state that at the session of 1871, as shown by the house journal, when the two

houses were in joint convention, for the purpose of electing directors for the state prison south, and for other purposes, the lieutenant-governor announced the next thing in order to be the election of directors of the southern state prison, and Senator Brown moved that the convention proceed first to the election of a director to fill the vacancy occasioned by the expiration of the term for which Mr. Meredith was elected in 1867, which was agreed to. Levi Sparks and George C. Clark were each put in nomination for that office. The roll was then called, and Sparks received seventy-eight votes and Clark seventy-one votes; and Levi Sparks having received a majority of the votes cast, the president of the senate declared him duly elected to the office of director of the southern state prison for the term of four years. Senator Brown then moved that the convention proceed to the election of director of the state prison to fill the vacancy occasioned by the expiration of the term for which Mr. Ghee was elected in 1867, and thereupon Senator Green offered a protest and resolution, declaring that at the last regular session, 1869, W. W. Curry was duly elected for the term of four years, and at the special session afterward, Robert S. Heiskell was duly elected also a director; "therefore, be it resolved, that in the opinion of this convention but one vacancy now exists to be filled at this time." This was not agreed to, but Senator Brown's motion was agreed to; and Mr. Simpson, of the convention, put in nomination for that office John Kirk; and there being no further nominations, the clerk proceeded to call the roll, and twenty-five senators and fifty members of the house, making in all seventy-five members of the convention, voted for said Kirk; and twenty-four senators and forty-seven members of the house, making in all seventy-one members of the convention, were present, but declined to vote. So Kirk, having received a majority of all the votes, the lieutenant-governor declared him duly elected director of the southern prison for the term of four years, in case a vacancy existed to be filled by the general assembly.

The lieutenant-governor then announced the next thing in order to be the election for the third director of the southern prison; whereupon Senator Hughes put in nomination Edward Price for that office, it being to succeed, as the journal recites, Mr. Heiskell, one of the present incumbents. There being no further nominations, the clerk proceeded to call the roll; twenty-five senators voted for Edward Price, and fifty-three members of the house, making

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in all seventy-eight votes; and twenty-four senators and forty-seven members of the house, making in all seventy-one, were present, and declined to vote. Mr. Price, having received a majority of all the votes cast, the lieutenant-governor declared him duly elected director for the southern state prison, in case a vacancy is found to exist. The senate journal of the proceedings of the joint convention shows the same facts, except that it shows that Price was put in nomination to fill the place then occupied by Mr. Curry. The principal secretary of the senate and the principal clerk of the house certified to the governor that Sparks was elected for four years, to fill the vacancy occasioned by the expiration of the term for which Mr. Meredith was elected in 1867; that Kirk was elected for the same term, to fill the vacancy occasioned by the expiration of the term for which Mr. Ghee was elected; and that said Price was elected for the term prescribed by law, without saying whom he was to succeed. The governor immediately commissioned Sparks, and he qualified, and discharged the duties of the office until he was superseded, as hereinafter stated. But the governor declined to commission Kirk, and did not do so until after the decision of this court in the case of *Baker v. Kirk*, 33 Ind. 517. After that decision Kirk was commissioned, qualified, and entered upon the discharge of the duties of the office. The governor refused to commission Price, on the ground that there was no vacancy in the office to which he was elected.

In May, 1869, Sparks was elected mayor of the city of Jeffersonville, a city incorporated under the general law of the State, for two years, and was qualified, and took upon himself the discharge of the duties of that office. At the same time of the election of Sparks as mayor a city judge was elected for the same term, in pursuance of a previous order of the common council for the election of such judge, and the said city judge was qualified, and took upon himself the duties of the office of city judge for said city. Sparks was acting as mayor at the time when he was elected director of the prison. Afterward, while Sparks was acting as director, under the commission so issued to him, he was again, in May, 1871, elected to the office of mayor of said city of Jeffersonville, accepted the office, qualified, and entered upon the discharge of his duties as such.

On the 22d day of May, 1871, the governor appointed and commissioned Robert S. Heiskell director of the prison, in place of

Sparks, on the ground that Sparks had, by being or becoming mayor of said city, vacated the office of director. Heiskell qualified, and entered upon the discharge of his duties as director. See the case of *Howard v. Shoemaker*, 35 Ind. 111, where it was held by this court that Sparks had vacated his office of director, and that Heiskell was therefore properly appointed by the governor.

It is conceded by counsel for the appellant that there were but two vacancies to be filled in the board of prison directors, at the session of the legislature in 1871, and these were in the directorships to which Meredith and Ghee had been elected in 1867. But it is claimed that Sparks was ineligible to the office of director, because at the time of his election, he was mayor of Jeffersonville; that the office of mayor is a judicial office, and that Sparks was therefore ineligible, under section 16, article 7, of the constitution of the State, to the office of director, or any other than a judicial office, during the term for which he had been elected; and that therefore Price should have been commissioned, and should have had the office of director, instead of Sparks.

The question whether the office of mayor, where there is a city judge, is a judicial office or not, was presented to this court in the case of *Howard v. Shoemaker*, *supra*, and, as it was not necessary to the determination of that case that it should be decided, and as the judges were not all of one opinion with reference to it, the case was disposed of upon other grounds. In the case under consideration, it seems to us unnecessary to decide the question, for the reason that we have come to a conclusion unfavorable to the appellant, on another vital point in the case.

It is a principle of law well settled in this State, that where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They cannot be counted to elect the ineligible candidate, or to defeat the election of an opposing candidate by showing that he did not receive a majority of the votes cast at such election. They are regarded as illegal, and as having no effect upon the election for any purpose. As a consequence, it follows that the candidate who is eligible, having the highest number of legal votes, though that number may be less than the number of votes cast for the ineligible candidate, and less than a majority of all the votes cast at such election, is entitled to the office. *Gulick v. New*, 14 Ind. 43. But this rule is applicable to those cases only where dif-

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ferent persons are candidates for the same office, and it has no application to cases where two or more persons are candidates at the same election for different offices. To apply the rule in such a case would be to put a party into an office for whom, as a candidate for that office, none of the electors had voted. It is true that the office of one prison director is the same as that of the others, except it may be with reference to the time of election and the term for which he is to serve. But we think it must be held that when one has been elected to succeed a designated person, he cannot act as the successor of another in the same body, on the ground that another who has been elected to succeed such other person was ineligible to the office.

There is some uncertainty, as it appears, in the journals of the two houses, as to the person whom Price was intended to succeed. The house journal states that he was to succeed Heiskell, while the senate journal says he was to succeed Curry. The convention had already elected Kirk to the directorship which was held by Heiskell, who, as we have seen, was filling out the term for which Ghee had been elected in 1867. It is clear, however, that Price was not elected to the directorship which had been held by Meredith, and by Clark, who was filling out his term by appointment of the governor. Should we hold, then, that Price could have the directorship to which Sparks was elected, on account of his being ineligible, we should put him in an office for which he received no votes. It seems to us that there are substantial reasons, in addition, why this cannot be done. In making up a board of prison directors, it may well be supposed that the legislature would, in the choice of the members, select them with regard to their residence, age, experience, and their peculiar talents or fitness for the place, so as to combine in the board all the elements and characteristics best calculated to take care of the interests of the State and of the convicts. Curry, Sparks, and Kirk might combine all the essential elements of a good board, while Curry, Kirk and Price, with equal or superior talents, in the aggregate, might not constitute such a board as the legislature would have elected.

In *The King v. Smith*, 2 M. & S. 406, the facts were that the borough of Wotton Bassett consisted of a mayor, two aldermen, and twelve capital burgesses out of whom the mayor and aldermen were chosen, and the capital burgesses were chosen by the mayor, aldermen, and capital burgesses. At a corporate meeting, one Starkey

made a pretended resignation of the office of capital burgess, and Smith was elected in his place, and sworn in. Starkey, at the time of his resignation, was an alderman, having been elected and sworn in as such at a former meeting, and had thereby vacated his office of capital burgess; and the number of capital burgesses was complete at the time of the meeting at which Starkey resigned, and Smith was elected in his place. In a *quo warranto* against Smith, for exercising the office of capital burgess, he showed for cause that, at the same meeting, Kibblewhite, then a capital burgess, was elected and sworn in an alderman, and thereby vacated his office of capital burgess, and while such vacancy continued, the defendant, Smith, was elected, and sworn in a capital burgess; but it was not shown that he was elected to fill up such vacancy, nor was it denied that he was elected to fill the vacancy supposed to be made by the pretended resignation of Starkey. His counsel contended that, there being an actual vacancy at the time of the defendant's election and swearing in, his title should be referred to that vacancy which did exist, so as to make him a burgess *de jure*, as well as *de facto*, although he was chosen upon a supposed vacancy which did not exist. The court said it was clear they elected Smith to fill up the supposed vacancy of Starkey, and no other, and, that being so, his election could not be referred to the vacancy of Kibblewhite; for it might have made a very material difference in the choice of the electors, if they had known that they were supplying any other vacancy than the supposed vacancy of Starkey. The same person who, in their judgment, might be fit to succeed him, might not have been selected in place of the other. It might be thought material to preserve a proportion between corporators of different descriptions or influence in the corporate body, which would make a consideration of the vacancy very important in the choice of a successor.

The reasoning in this case is quite applicable to the case under consideration. We are of the opinion that there was no error committed by the circuit court in its rulings in the case.

Judgment affirmed, with costs.

McGuire v. Smock.

McGUIRE v. SMOCK.

(48 Ind. 1.)

Contract against public property—Petition for street improvements.

Some of the abutters on a street, in order to secure the requisite number of signatures to a petition for the improvement of the street, agreed to pay part of the sum assessed on other abutters, provided they would sign the petition. In an action on the agreement, *held*, that it was against public policy and void.

APPEAL from the Marion superior court.

OSBORN, C. J. The appellants instituted an action against the appellees upon a written instrument, of which the following is a copy :

“ INDIANAPOLIS, April 8th, 1870.

“ We, the undersigned, guarantee unto Douglass Maguire and William J. Gillespie the sum of eight hundred dollars, on the assessment for improving Delaware street with the Nicholson pavement in front of their property on said street, provided they petition the city of Indianapolis for said improvement.

“ WM. C. SMOCK,

“ D. H. WILES,

“ J. T. WRIGHT.”

It is alleged in the complaint that the appellants did petition the city counsel for the improvement, and did become liable to pay a large sum for and upon the assessments upon their property for the improvement, and in a much larger sum than eight hundred dollars; that they have been compelled to pay, and have paid, the assessments upon their property for such improvement, an amount exceeding eight hundred dollars; that the defendants, the appellees, were then the owners of property bordering on said street, and were very desirous to obtain the construction of the improvement, for the purpose of enhancing the value of their property bordering thereon; that they made the contract in consideration of the benefits they would receive from the construction of the improvement; that they afterward paid all of the eight hundred dollars, except

the sum of two hundred and sixteen dollars and sixty-six cents, which remains unpaid.

A demurrer was filed to the complaint, which was overruled. The appellants answered, alleging, amongst other things, that at the time of the execution of the written instrument sued on, a question was pending before the common council of Indianapolis as to whether the improvement contemplated in the writing should be made at the expense of the city and numerous owners of real estate on and along the line of the street between the points named; that the plaintiffs were owners of real estate on and along the street between those points, and, as such, had signed a remonstrance with other owners against the contemplated improvement; that afterward they corruptly and fraudulently entered into the agreement mentioned in the complaint, and petitioned the council to make the improvement; that the council caused the work to be done; and that the cost of it was assessed against the property bordering on the street, and paid by the owners, stating the sums paid by the several remonstrators.

A demurrer to the answer was overruled, and a reply filed admitting that they had signed a remonstrance as alleged in the answer, but averring that it was done, "not because they were opposed to the work in itself considered, but because they did not feel pecuniarily able to bear the expense that would be assessed against their property by reason of said improvement;" that the defendants came to them, without solicitation or inducement on their part, and proposed to enter into, and executed, the contract, which they accepted, and afterward signed the petition in perfect good faith, and without any desire or design whatever to corruptly or fraudulently influence the said common council, or any officer or person connected with the government of the city; that after receiving the contract, they were willing and anxious to have the improvement made, and were willing to pay all over the said sum of eight hundred dollars which would be assessed against their property, and by reason thereof signed the petition for the purpose of procuring the improvement to be made.

On motion of the appellees, a part of the reply was stricken out. The motion was to strike out all between the first word on the second page and the second word on line thirteen of said second page, all on page one, and beginning at the second word of line twenty-two on said second page, and strike out all the remainder of the

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reply. We have no means of determining what was included in the motion. The record does not show how the reply was paged and lined. We must take the reply as we find it in the record, presuming that the clerk has omitted what was stricken out.

A demurrer was filed and sustained to the reply. The appellants refusing to amend or reply further, final judgment was rendered against them for costs. Proper exceptions were taken by the parties to the several rulings of the court.

An appeal was taken to the general term, where the judgment of special term was affirmed. The appellants seek to reverse the judgment for the alleged errors of the court in overruling the demurrer to the answer, in sustaining the motion to strike out a part of the reply, and in sustaining the demurrer to the reply.

The law authorized the common council to cause the improvement contemplated in the contract to be made, on the petition of the resident owners of two-thirds of the whole line of lots, or parts of lots, bordering on the street, or part of street, sought to be improved at the expense of the owners of lots bordering on the street, or the part thereof to be improved, except so much thereof as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys which were chargeable to the city.

The council possessed no authority to cause the improvement to be done without the petition, except with the concurrence of two-thirds of the members thereof. With such concurrence and without any petition, the council might order or cause the improvement to be made, and either charge and cause the expense thereof to be assessed and collected as provided when petition is filed, or if deemed just and right by the common council, cause the expense, or any part thereof, to be paid out of the general revenue of the city. 3 Ind. Stat. 98 to 104, §§ 68 to 71.

We are not informed by the pleadings whether the petition contained the number of names of resident owners requisite to authorize the common council to cause the improvement to be made by a majority vote or not. We are informed, however, that the question of making the improvement was pending before the common council; that the appellants and others had remonstrated against it, and that it was important to overcome the opposition of the appellants and change them from remonstrators against to petitioners for the improvement, in order to control the action of the common council in favor of the work. We do not consider it necessary to decide

whether the council were compelled to cause the work to be done on filing the petition, or whether it was optional with them to do it or not; nor whether the names of the appellants were necessary to make the requisite number to enable the council to act by a majority vote. Their names were to be added to the petition to affect the action of the council. The council would be controlled to a considerable extent by the wishes of the property owners. The nearer they approached to unanimity in favor of the work the more likely the council would be to order it to be done. They would have a right to believe that every property owner petitioning for it did so with the expectation that he was to actually assume his share of the burdens; that he signed the petition in good faith, and not under a contract by which he was to be relieved of the whole, or any part, of his share of the cost of the improvement, whilst he was seeking to have others taxed for the whole amount of their share under the law. "Any arrangement or combination among the parties applying, whereby a few individuals, desirous of causing the grading and paving to be done, procured the signatures of others to the application by paying them a consideration therefor, either directly or indirectly, is a fraud in the law, and contrary to public policy." *Howard v. The First Independent Church of Baltimore*, 18 Md. 451.

This case is very much like the one cited. The following have some bearing upon the question: *Hatzfield v. Gulden*, 7 Watts, 152; *Gil v. Williams*, 12 La. An. 219; *Dexter v. Snow*, 12 Cush. 594; *Powers v. Skinner*, 34 Vt. 274; *Fuller v. Dams*, 18 Pick. 472; *Brown v. Brown*, 34 Barb. 533; *Devlin v. Brady*, 32 id. 518; *Harris v. Roof's Ex'rs*, 10 id. 489.

It is true that the appellants aver in their replication that they were not opposed to the work "in itself considered," but because they did not feel pecuniarily able to bear the expense of it; that as soon as the appellees by their contract, undertook to relieve them from the expense, they at once became equally as anxious for its accomplishment as the appellees were, and willingly petitioned for it; and hence they acted in good faith. It is possible that the other remonstrators were opposing the work for the same want of pecuniary ability to bear the expense, and not because they were opposed to it in itself considered. Perhaps all of them might have been converted upon the same terms that the appellants were. Their opposition was predicated entirely upon an objection to pay-

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ing for the work. We think very few persons who would be willing to be benefited by the labor or means of others would remonstrate against paving a street in front of their property if the cost of it was to be borne by some one else. They would not object to the work in itself considered.

It is admitted in the replication that the appellants were induced to sign the petition by reason of the guaranty set out in the complaint; that that was its sole consideration. The affirmation of good faith and denial of fraud do not relieve the act of its culpability. Courts will not aid either party to enforce such contracts. The answer was good and the replication bad.

The judgment of the said superior court is affirmed, with costs.

J. E. McDonald, J. M. Butler and E. M. McDonald, for appellants.

C. H. Test, D. B. Burns and G. S. Wright, for appellees.

CLINE V. GUTHRIE.

(42 Ind. 227.)

Promissory Note—fraud in obtaining signature—want of delivery.

The maker of a promissory note was induced by the fraud and circumvention of the payee to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and the maker did not, after he discovered that he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker and negotiated. *Held*, that the maker was not liable on the note to an innocent purchaser for value and before maturity: 1st, because of the fraud, and, 2d, because of the want of delivery

ACTION by appellee upon a promissory note of the following tenor, the italicised parts being the written part of the note:

“Lexington, Scott Co., Ind., Oct. 22d, 1869.

“Nine months after date I promise to pay Miles & Spaulding, or bearer, two hundred and eighty-seven & 50-100 dollars, payable at

the First National Bank of Madison, for value received, with interest, without relief from valuation or appraisement laws, interest at 10 per cent per annum after maturity, and attorney's fees if suit be instituted. The drawer waives presentment for payment, protest, and notice of protest and non-payment of this note.

“287.50.

Abraham Cline.”

Indorsed as follows: “Sold and transferred this day to A. Guthrie, without recourse to us, Nov. 20th, 1869.

“MILES & SPAULDING.

“Per MILES.”

The facts are set forth by the court at great length, but as the point at issue is sufficiently apparent from the statement of the “substantial facts” in the opinion, we have omitted the fuller statement.

S. K. Wolfe, for appellant.

J. Y. Allison and *W. T. Friedley*, for appellee.

BUSKIRK, J. The substantial facts averred in the third paragraph of the answer, and those proved on the trial are, that the appellant was induced, by the fraud and circumvention of the payees of the note in suit, to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payees to see how his name was spelled or written, and that the appellant did not, after he discovered that he had signed his name to the note, voluntarily deliver the note to the payees, but that the same was wrongfully and forcibly taken possession of by the payees, and by them carried away against the consent, and over the objection, of the appellant.

Do the above facts constitute a valid defense to the note, in the hands of a purchaser and holder in good faith and for value, before the maturity of the note?

It is well settled by authority and on principle, that the party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the

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signature included. *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548; *Foster v. Mackinnon*, Law Rep. 4 O. P. 704, given in note, 4 Am. Rep. 238; *Whitney v. Snyder*, 2 Lans. 477, given in note, 4 Am. Rep. 238; *Nance v. Lary*, 5 Ala. 370; *Putnam v. Sullivan*, 4 Mass. 45; *Taylor v. Atchison*, 54 Ill. 196; 5 Am. Rep. 118, *Wart v. Pomeroy*, 20 Mich. 425; 4 Am. Rep. 395; *Caulkins v. Whisler*, 29 Iowa, 495; 4 Am. Rep. 237.

In *Walker v. Ebert*, *supra*, the court after referring to several cases, and laying down in substance the above propositions of law, proceeded to say: "The reasoning of the above cases is entirely satisfactory and conclusive upon this point. The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such cases pre-supposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii*, begging the question altogether. It is, to use a homely phrase, putting the cart before the horse, and reversing the true order of reasoning, or rather preventing all correct reasoning, and investigation, by assuming the truth of the conclusion, and so precluding any inquiry into the antecedent fact or premise, which is the first point to be inquired of and ascertained. For the purpose of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. It must always be

competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts; as, by infants, married women, or insane persons; or where they are void for other cause, as, for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instruments by putting them in the form of negotiable paper. See *Veeder v. Town of Lima*, 19 Wis. 297 to 299, and authorities there cited. See also *Thomas v. Watkins*, 16 Wis. 549."

We proceed to inquire whether, conceding that the appellant signed his name to the note with full knowledge of its character, it is invalid and void for the want of delivery.

The case of *Burson v. Huntington*, 21 Mich. 415; 4 Am. Rep. 497, is in all of its facts, incidents, circumstances, and questions of law very similar to the case under consideration, and as the case is well considered, we make an extended quotation from the very able and learned opinion of the court. The court say:

"These facts, if found by the jury, would show, not only that the note was never delivered to the payee, and that it, therefore, never had a legal existence as a note between the original parties, but that there was yet no completed or binding agreement of any kind, and was not to be until defendant should choose to get a surety on the note, and the payee should give him a deed of territory. Until thus completed, the defendant had a right to retract.

"As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. See *Edwards on Bills and Notes*, 175, and authorities cited, and 1 *Pars. on Bills and Notes*, 48, 49, and cases cited; and see *Thomas v. Watkins*, 16 Wis. 549; *Mahon's Adm'r v. Sawyer*, 18 Ind. 73; *Carter v. McClintock*, 29 Mo. 464.

"Delivery is an essential part of the making or execution of the note, and it takes effect only from delivery (for most purposes); and if this be subsequent to the date, it takes effect from the delivery, and not from the date. 1 *Pars. ubi supra*. This is certainly true as between the original parties.

"But negotiable paper differs from ordinary written contracts in this respect; that even a wrongful holder, between whom and the

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maker or indorser the note or indorsement would not be valid, may yet transfer to an innocent party, who takes it in good faith, without notice and for value, a good title as against the maker or indorser. And the question in the present case is, how far this principle will dispense with delivery by the maker. When a note payable to bearer, which has once become operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker, and all indorsers on the paper when in the hands of the loser; and the loser must sustain the loss. In such a case there was a complete legal instrument; the maker is clearly liable to pay it to some one; and the question is only to whom.

“But in the case before us, where the note had never been delivered, and therefore had no legal inception or existence as a note, the question is whether he is liable to pay at all, even to an innocent holder for value.

“The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker, before delivery, is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note. But it is urged that this case falls within the general principle which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This is a principle of manifest justice, when confined within its proper limits. But the principle, as a rule, has many exceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged can properly be said to have ‘enabled the third person to occasion the loss,’ within the meaning of the rule. If I leave my horse in the stable, or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible

to steal him from that particular locality. And, upon examination, it will be found that this rule or maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person, whose acts or negligence have enabled such third person to occasion the loss: and that the party has been held responsible for the acts of those in whom he had trusted, upon grounds analogous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions by which the rights of others may be affected, has, as to the person to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or *indicia* of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confidence is, as to those who have been deceived into parting with property or incurring obligations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearances.

“Hence, to confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery, have no bearing upon the question. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily deliver it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to, or discounted by a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions not apparent upon the face of the paper, and the person to whom it is thus intrusted violate the confidence reposed him, and put the note into circulation; this, though not a valid delivery as to the original parties must, as between a *bona fide* holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder; or if the note be sent by mail, and get into the wrong hands; as the party intended to deliver to some one, and selects his own mode of delivery, he must be responsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect, if the note or indorsement were signed in blank, if the maker or indorser part with the possession, or authorize

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a clerk or agent to do so, and it is done. 1 Parsons B. & N. 109-114, and cases cited, especially *Putnam v. Sullivan*, 4 Mass. 45, which was decided expressly upon the ground of the confidence reposed in the third person, as to the filling up, and in the clerk's as to delivery. And when the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is thus fraudulently obtained from him, he must, doubtless, as between him and an innocent holder for value, bear the consequences of his own credulity and want of caution. He has placed a confidence in another, and by putting the papers into his hands, has enabled him to appear as the owner, and to deceive others. Cases of this kind are numerous; but they have no bearing on the wrongful taking from the maker, when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud; when it is laid down as a general rule, that it is no defense for a maker, as against a *bona fide* holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not.

"We do not assert that the general rule we are discussing—that 'where one of two innocent parties must suffer,' etc., must be confined exclusively to the cases where a confidence has been placed in some other person (in reference to delivery) and abused.

"There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up non-delivery; as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken."

It is quite clear to us that the court erred in sustaining the demurrer to the third paragraph of the answer and in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial and then overrule the demurrer to the third paragraph of the answer, and for further proceedings in accordance with this opinion.

MAINS V. STATE.

(42 Ind. 327.)

Nuisance — indictment for.

Indictment for keeping a disorderly house to the damage and common nuisance of all the citizens of the State. *Held*, bad, for not showing particularly that the house was in a public place or that the public were affected thereby.

THE appellant was indicted for a nuisance and convicted, and judgment was rendered against her over motions to quash and in arrest of judgment. Exception.

The following is the indictment :

STATE OF INDIANA	}	<i>Indictment for Nuisance.</i>
<i>agst.</i>		
NANCY MAINS.		

“The Grand Jurors of Noble County, in the State of Indiana, good and lawful men, duly and legally empannelled, charged, and sworn to inquire into felonies and certain misdemeanors, in and for the body of said county of Noble, in the name and by the authority of the State of Indiana, on their oaths present, that one Nancy Mains, late of said county, on the 20th day of April, in the year A. D. 1872, and on divers other days and times between that day and the making of this presentment, at the county of Noble and State of Indiana, did then and there unlawfully keep and maintain a certain common, ill-governed, and disorderly house, and in said house certain persons, as well men as women, of ill name and fame, and of dishonest conversation, then and there, on the said other days and times, unlawfully and willingly did cause and procure to frequent and come together, and the said men and women in the said house of said Nancy Mains at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling, whoring, and misbehaving themselves, unlawfully and willfully did permit, and yet doth permit, to the great damage and common nuisance of all the citizens of the State of Indiana, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.

WILLIAM B. McCONNELL,
“Prosecuting Attorney.”

Mains v. State.

W. M. Clapp, F. Prickett and A. A. Chapin, for appellant.

J. C. Denny, attorney-general, for State.

WORDEN, J. Several objections are made to the indictment, but we shall notice one only, as that seems to be fatal, whatever might be said in respect to the others.

The indictment does not allege that the house which the appellant was charged with keeping was situate in any public place, as in a city, town or village, nor near any public street or highway; nor does it allege that any person resided near thereto, or was in the habit of passing thereby. In short, there is nothing in the indictment which shows that the house was in the vicinity of any inhabitants, or that any person ever came near it, save those who congregated there by the alleged procurement of the appellant. In the language of the counsel for the appellant: "For aught that appears, it may have been in the woods, away from the sight and hearing of every citizen of the State."

The keeping of a house where tippling, drinking, and whoring are carried on is not a nuisance, unless the public is affected by it.

A writer on criminal law says: "The term disorderly house is sometimes used in a very broad sense, as including bawdy-houses, common gaming-houses, and places of a like character, to which people promiscuously resort for purposes injurious to public morals, or health or convenience, or safety. These places are all indictable as public nuisances. * * A house so kept that no person other than its inmates are liable to be disturbed by it, or corrupted in their morals, or any thing of the sort, is not in law a disorderly house. * * The difficulty within must reach beyond the mere inmates and affect the public." 1 Bishop Crim. Law, §§ 1046, 1051.

Inasmuch as such a house as that described in the indictment is not a nuisance *per se*, but can only become so by reason of the public being affected thereby, the indictment should have alleged the facts making it a nuisance, as that it was in a public place, or that people resided near thereto, or other similar circumstances, showing that the public was affected thereby.

"The indictment for a nuisance, as for every other offense, must set out so much of fact as to make the criminal nature of what is charged against the defendant appear. Thus, where a thing is not

a nuisance in itself, but becomes so only by reason of particular circumstances, this special matter—in other words, these circumstances—must be shown, else there is no crime laid against the defendant.” 2 Bish. Crim. Proced., § 813.

The indictment, it is true, alleges that it was “to the great damage and common nuisance of all the citizens of the State of Indiana,” but this conclusion will not supply the omitted facts. “There is no power in a conclusion of this sort to supply any defect in the main body of the allegation.” 2 Bish. Crim. Proced., § 812. Wharton says, “An allegation in an indictment that certain facts charged were ‘to the common nuisance of all the good citizens of the State,’ will not make a good indictment for a common nuisance unless these facts be of such a nature as may justify that conclusion as one of law as well as of fact.” Whart. Crim. Law, sec. 2362.

There are some other questions in the case which are ably discussed by the counsel for appellant, such as the necessity of a statutory description of the offense of a nuisance, and whether any such description embraces such facts as are charged in this indictment, but we pass them over as not being essential to the decision of the cause. We hold the indictment bad, for the reason, if for no other, that it does not aver any facts showing that the public was in any manner affected by the house which the appellant was charged with keeping.

The judgment below is reversed, and the cause remanded, with instructions to the court below to quash the indictment.

SHEAN V. SHAY.

(43 Ind. 375.)

Fraudulent conveyance—who is creditor—Slander.

One having a cause of action for slander is a creditor within the meaning of the statute against fraudulent conveyances.

The defendant in an action of slander, after the words were spoken, but before the action was brought, conveyed his land without consideration to defeat any judgment the plaintiff might recover. *Held*, that the conveyance was fraudulent.

Shean v. Shay.

THE appellants sued the appellees, seeking to enjoin the sale of certain real estate, of which they claim to be the owners. It is stated, in substance, in the complaint, that on the 17th day of November, 1869, the real estate was conveyed, by Jeremiah Shean and Ellen Shean, to the appellants, by deed of that date, for the consideration of one dollar and natural love and affection, the grantees being children of the grantors, and that the deed was duly recorded on the 5th day of February, 1870. It is further stated, that said Jane Shay, on the 26th day of November, 1869, sued said Ellen Shean and Jeremiah Shean, for slanderous words spoken by said Ellen of her, in the said circuit court, and on the 2d day of November, 1870, recovered judgment against said Shean and wife for four hundred and fifty dollars and costs; that on the 7th day of October, 1871, an execution was duly issued on said judgment to the Sheriff, Ruckle, who is one of the appellees, who has levied the same on said property, and advertised the same for sale to pay and satisfy said judgment, etc. It is further alleged that the said Jeremiah Shean and Ellen Shean are not the owners of said real estate, but that the same is owned by the appellants. Prayer for an injunction, etc.

In the second paragraph of the answer, the defendants say that on the 1st day of August, 1869, the said slanderous words were spoken by the said Ellen Shean of the said Jane Shay, and that said Shean and wife, believing that said Jane Shay was about to institute an action therefor, and to prevent the collection by her of her damages therefor, fraudulently, and without any valuable consideration therefor, and with intent to cheat, delay, and defraud the said Jane Shay in the collection of said damages, executed the said deed to appellants, of all of which the appellants had full notice.

There was a demurrer by the appellants to this paragraph of the answer, for the reason that it did not state facts sufficient to constitute a defense to the action, which was overruled, and to which ruling the appellants excepted.

The appellants then replied in denial of the second paragraph of the answer. There was a trial by the court and what purports to be a special finding by the court with conclusions of law, but which we can treat only as a general finding, for the reasons that it does not appear to have been made at the request of the parties or any of them, and it is not signed by the judge, or contained in any bill of exceptions. A motion for a new trial was made by the plain-

tiffs, which was overruled by the court, and final judgment rendered for the defendants.

Two errors are assigned: 1. The overruling of the demurrer to the second paragraph of the answer; and, 2. The refusal to grant a new trial.

I. Klingensmith, C. Coulon, and J. S. Harvey, for appellants.

F. M. Finch and J. A. Finch, for appellees.

DOWNEY, J. [After stating facts.] We regard the facts alleged in the second paragraph of the answer, taken in connection with the allegations of the complaint, as sufficient to show that the conveyance in question was fraudulent. The slanderous words are alleged to have been spoken on the 1st day of August, 1869, and hence at that date a cause of action accrued to the appellee Jane Shay, against the said Shean and wife. The answer alleges that afterward, on the 17th day of November, 1869, as shown by the complaint, the deed was fraudulently made and received, to cheat and defraud the said Jane Shay out of the damages to which she was entitled. That no suit was pending to recover damages when the deed was made, does not make the answer bad. As is said in *Ray v. Roe, ex dem. Brown*, 2 Blackf. 258, "The pendency of a suit is one of the many badges of fraud, which would induce a court of equity to set aside such conveyance, or a jury to regard it as a nullity, in a trial at law." But it is only one of the badges. The deed may be shown to be fraudulent and void as to creditors, when no suit was pending to recover the debt or damages when it was made. It may be true that in many cases the fraudulent deed is found to have been made after the commencement of the action. Such was the case in *Rogers v. Evans*, 3 Ind. 574; *Wright v. Brandis*, 1 id. 336; and *Pennington v. Clifton*, 10 id. 172. But the pendency of the action creates no lien, and a deed made for a valuable consideration and in good faith may be valid, notwithstanding the pendency, at the time, of an action against the grantor. *Lowry v. Howard*, 35 Ind. 170. The cases which we have already cited show that one having a cause of action for slander is a creditor within the meaning of the statute against fraudulent conveyances.

The other alleged error relates to the refusal to grant a new trial. In our judgment, the evidence fully sustains the finding of the

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court, and not only justified, but required the court to overrule the motion for a new trial. According to the view which we take of the case, the question whether the deed was delivered on the 17th day of November, 1869, before the suit was commenced, as claimed by counsel for the appellant, or on the 5th day of February, 1870, after the commencement of the action, as contended for by counsel for the appellee, need not be decided by us, as in either event we think the evidence was clearly sufficient to show the fraudulent character of the deed.

Judgment affirmed, with costs.

CLEM V. STATE.

(43 Ind. 420.)

Criminal Law—Former acquittal—Where same act causes death of two—identity of crime.

Indictment for the murder of A.; plea, former acquittal of the murder of B., which crime "was and is identical in all its parts, incidents and circumstances with the crime charged in the indictment" on trial and that "the evidence whereby alone the State will attempt to prove the indictment in this cause is the same and no wise different from that employed on the trial" of the former indictment. *Held* that the plea was good without an averment of the identity of A. and B.

Where the same act results in the death of two or more persons and the person committing the act is convicted or acquitted on the trial of an indictment for the murder of one, he cannot be indicted for the murder of the other.

THIS was an indictment for murder in the first degree against the appellant, and Silas Hartman, and William J. Abrams, found and returned by the grand jury in the Marion Criminal Court. It is stated that the grand jurors of the county of Marion and State of Indiana, impanelled, charged, and sworn to inquire of felonies and misdemeanors committed within the county of Marion, in said State of Indiana, on their oath, do present, charge, and find, that Silas Hartman, Nancy E. Clem, and William J. Abrams, all late of said county and State, and all being then and there of

sound mind, on the twelfth day of September in the year of our Lord one thousand eight hundred and sixty-eight, at said county of Marion and State of Indiana, did, with force and arms, unlawfully, feloniously, purposely, and with premeditated malice, make an assault upon one Jacob Young, then and there and in the public peace being, and did then and there, with force and arms, and with guns and pistols, and with leaden balls, shot and slugs, then and there shot off and discharged by the said Silas Hartman, Nancy E. Clem, and William J. Abrams, from said guns and pistols, at and against the said Jacob Young, him, the said Jacob Young, then and there, unlawfully, feloniously, purposely, and with premeditated malice, touch, strike, bruise and wound, then and there and thereby giving the said Jacob Young, in and upon the head of him, the said Jacob Young, one mortal wound of the length of two inches and of the depth of six inches, of which said mortal wound the said Jacob Young then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say, that the said Silas Hartman, Nancy E. Clem, and William J. Abrams, the said Jacob Young, then and there, in manner and form aforesaid, unlawfully, feloniously, and with premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

A change of the venue was granted, on the application of the defendant, first from the judge of the criminal court, and then from the county of Marion to the county of Boone.

The defendant pleaded a former acquittal on another indictment charging her with the same crime. The State demurred to this plea, the demurrer was sustained, and the defendant excepted. She then pleaded not guilty, there was a trial by jury, and the jury failed to agree upon a verdict. At a subsequent term of the court there was a second trial by jury, which resulted in a verdict of guilty of murder in the second degree, the jury returning with their verdict the following recommendation: "We, the jury, who have this day made our verdict in the case of *The State v. Nancy E. Clem*, recommend her to the clemency of the executive of the State in her behalf."

The defendant moved the court for a new trial, her motion was overruled, and final judgment, of imprisonment for life, was rendered on the verdict. Two errors are assigned in this court.

Clem v. State.

J. W. Gordon, D. W. Voorhees, W. W. Leathers, J. Hanna, F. Knefler, C. C. Galvin and S. C. Wessner, for appellant.

B. Harrison, J. T. Dye, and J. C. Denny, attorney-general, for the State.

DOWNNEY, J. [After stating the foregoing facts.] Two errors are assigned in this court :

1. The sustaining of the demurrer to the plea of former acquittal; and,
2. The overruling of the motion for a new trial.

In the plea of former acquittal the defendant alleges, that heretofore, on the 20th day of October, 1868, in the Marion criminal court, the grand jury, duly impanelled, sworn, and charged, etc., returned into open court an indictment, charging that Silas Hartman, Nancy E. Clem, the identical person now defendant in this action, and William J. Abrams, on the 12th day of September, 1868, at, etc., did, with force and arms, unlawfully, feloniously, purposely, and with premeditated malice, make an assault upon one Nancy J. Young, then and there and in the public peace being, and did, then and there, with force and arms, and with guns and pistols, and with leaden balls, shot, and slugs, then and there shot off and discharged by the said, etc., from the said guns and pistols aforesaid, at and against the said Nancy Jane Young, her the said Nancy Jane Young, then and there, unlawfully, feloniously, purposely, and with premeditated malice, touch, strike, bruise and wound, then and there and thereby giving said Nancy Jane Young, in and upon the head of her, the said Nancy Jane Young, one mortal wound of the length of two inches and of the depth of six inches, of which said mortal wound the said Nancy Jane Young then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say and find, that the said Silas Hartman, Nancy E. Clem and William J. Abrams, the said Nancy Jane Young, then and there, in manner and form aforesaid, unlawfully, feloniously, purposely, and with premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana. And she says that the said indictment was duly signed by the prosecuting attorney, etc., indorsed by the foreman of the grand jury as a true bill, filed in open court, and duly recorded. And afterward,

on the 23d day of October, 1868, etc., the defendant having been arraigned upon said indictment and required to plead thereto, for plea thereto then and there said, that she was not guilty as charged therein, and afterward, on the 9th day of February, 1869, etc., the said case being called in said court for trial, the parties proceeded to impanel a jury to try the same, and on the 10th day of February, 1869, etc., the State and the said Nancy E. Clem having elected twelve good and lawful men, resident householders of said county of Marion, the same were duly impanelled in and by said court, and sworn upon said jury according to law, and the said parties then and there and thenceforward proceeded in and by said court and jury to try said cause, and such proceedings were then and there had in said case that afterward, on the first day of March, 1869, etc., the said jury returned into court the following verdict, to wit: "We, the jury, find the defendant guilty of murder in the second degree as charged in the indictment, and sentence her to be imprisoned in the State's prison during life." And afterward, on the 29th day of March, 1869, etc., the said court rendered judgment upon said verdict against the said defendant, in substance and effect as follows: It is therefore considered by the court that said defendant, Nancy E. Clem, for the offense aforesaid, be confined in the State's prison for life, and that she pay and satisfy the costs of said prosecution. And she avers and charges that by the verdict and judgment aforesaid thereon, she was fully acquitted of the charge of murder in the first degree as charged in said indictment, which will more fully appear, reference being had to the record of the proceedings and judgment aforesaid, which she makes part of this her plea, etc. And the said defendant avers that the crime charged against the defendant in said indictment, and of which she was tried and acquitted, as hereinbefore set forth, by the verdict of the said jury, was and is identical in all its parts, incidents, and circumstances with the crime charged in the indictment first above in this plea specified, and to which this plea is now by her pleaded; and that the evidence, whereby alone the said plaintiff can or will attempt to support and prove the indictment against her in this case, is the same, and nowise different from that employed and produced against her upon the trial of the indictment aforesaid; in which trial she was acquitted, as hereinbefore stated, of the crime of murder in the first degree. And this she is ready to verify; wherefore, etc.

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The cause of demurrer to the answer was, that it did not state facts sufficient to constitute any good and sufficient plea to the indictment.

When there is a demurrer to a pleading, all the facts stated in the pleading, which are well pleaded, are to be taken as true for the purpose of determining the sufficiency of the pleading. The question is, does the pleading state facts sufficient to show that the defendant had been indicted in a court of competent jurisdiction, and tried and acquitted of the crime of murder in the first degree, with which she is charged in this indictment? If so, then it is a right secured by the common law, and guaranteed by the constitution of this State, that she shall not be again put in jeopardy for the same offense. 4 Bl. Comm. 335; Const. of Ind., art. 1, § 14.

When a defendant is charged with the crime of murder in the first degree, he may be found guilty in that degree, or he may be convicted of murder in the second degree or of manslaughter, as the evidence may justify and require. 2 G. & H. 405, § 72; *Dukes v. The State*, 11 Ind. 557; *Kennedy v. The State*, 6 id. 485. If upon such an indictment the jury find the defendant guilty of an inferior grade of homicide without saying any thing as to the higher grade, the verdict is, by implication, an acquittal of the higher grade of the crime. 2 G. & H. 417, § 110; *Weinzorpflin v. The State*, 7 Blackf. 186; *Brennan v. The People*, 15 Ill. 511; *Hurt v. The State*, 25 Miss. 378.

Two objections are urged to the plea, or to its allowance :

1. That it does not show that the crime of which the defendant was acquitted was the same as that for which she was about to be tried ; and,

2. That the same facts might have been given in evidence under the plea of not guilty.

It is urged that the plea should show by proper allegation that the person in this indictment alleged to have been killed is the same person who was alleged to have been killed in the indictment in the former prosecution. In other words, that, in order to make it good, the plea should have alleged that Jacob Young, mentioned in the indictment in this case, is the same person as Nancy Jane Young, the person alleged to have been killed in the indictment on which the defendant was previously acquitted. But evidently this cannot be so, else when two persons are killed by

the same act, and when the crime would therefore be one and indivisible, and when the State had chosen to indict the defendant and try him for the killing of one of them, there could be no plea of former acquittal when he was indicted for the death of the other produced by the same act. When, however, but one person has been killed, and in the second indictment the defendant is charged with the same crime, then, if the two indictments do not, when brought together, show that the person, charged in the second indictment to have been killed, is the same person mentioned in the first, that fact must be expressly alleged in the plea. But, if we are right in our view of the case under consideration, it is not only not necessary that the plea should contain such an allegation, but it would be impossible, consistently with the truth, that it could do so. If it be true, as we suppose it is, that the killing of two or more persons by the same act constitutes but one crime, then it follows that the State cannot indict the guilty party for killing one of the persons, and after a conviction or acquittal indict him for the killing of the other; for the State cannot divide that which constitutes but one crime, and make the different parts of it the bases of separate prosecutions. But when the State has prosecuted the accused for one part of the crime, she cannot again prosecute him for the other or remaining part of it. Hence, if the killing of Jacob and Nancy Jane Young resulted from the same act, and therefore one crime, and the State has prosecuted the accused for the murder of Nancy Jane Young, one part of the crime, it cannot again prosecute her for the murder of Jacob Young, the other part of the crime. The gist of the plea, therefore, in this case is, that the felonious act with which the defendant is charged in the indictment resulted in the death of both Jacob and Nancy Jane Young, and that the State, having prosecuted the defendant for part of the crime, should not prosecute for the other part.

The plea of former acquittal is very simple in its structure. It is said to be a plea of a mixed nature, and to consist partly of matter of record, and partly of matter of fact. The matter of record is the former indictment and acquittal, the matter of fact is the averment of the identity of the offense and of the defendant as the person formerly indicted. 1 Chit. Crim. Law, 459. There is no question made in this case as to the sufficiency of that part of the plea which sets forth the matter of record, that is, the former indictment and

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acquittal. But the objection is, that it does not sufficiently allege the identity of the felony charged in this case with that charged in the former case, of which the defendant was acquitted. The form of the allegation of identity in the precedents is very general. Consulting some of the forms, we find it stated as follows; "That the felony and murder in the said former indictment mentioned, and the felony and murder in this present indictment mentioned, are one and the same felony and murder and not divers and different felonies and murders." Whart. Proced. 1150. "And that the felony of which he, the said A. B., was so indicted and acquitted, as aforesaid, and the felony of which he is now indicted, are one and the same felony." Bicknell Crim. Prac. 120. Under this general allegation the evidence is admissible to show whether the felonies are in fact the same or not.

The language of the plea, with reference to the identity of the crime, is not exactly that which is used in the approved precedents, but we think it is in effect the same. It states that the crime charged against the defendant in said indictment, and of which she was tried and acquitted, was and is identical in all its parts, incidents and circumstances, with the crime charged in the indictment upon which she was about to be tried, and that the evidence, whereby the State could and would attempt to support and prove the same, is the same, and nowise different from that employed and produced against her upon the former trial. It seems to us that this language sufficiently shows that the crimes are the same. It does not follow because one of the indictments was for the murder of Nancy Jane Young, and the other for the murder of Jacob Young, that the crime is not the same. If the same act of the defendant resulted in the death of both of them, there was but one crime. Where, by the discharge of a fire-arm, or a stroke of the same instrument, an injury is inflicted upon two or more persons, or their death produced, there was but one crime. In *The State v. Damon*, 2 Tyler, 387, the defendant was indicted for an assault and battery on one Doty, and pleaded a former conviction on a complaint for an assault and battery committed upon one Miller, alleging that the wounding of each was by the same stroke, and at the same time. The court said, in delivering its opinion: "It appears that the defendant wounded two persons in the same affray, at the same instant of time, and with the same stroke. On a regular complaint made, he has been convicted before a court of

competent jurisdiction for assaulting, beating and wounding Frederick Miller, one of those persons. He stands here indicted for assaulting beating and wounding Elias Doty, the other of those persons; and the defendant pleads in bar the former conviction, which he alleges to have been for the same offense. The only question is, whether the defendant has been already legally convicted of the offense charged in the indictment. Of this there can be no doubt; for it is apparent on the record, that the assault and battery charged in the indictment, and that of which he was convicted by Mr. Justice RANDALL, were at the same place, and in the same affray, and the wounds made by the same instrument, and by the same stroke.

“This is not a question between either of the parties injured by the assault and battery and their assailant; redress has been or may be obtained by them by private action; but it is a question between the government and its subject, and the court are clearly of the opinion that the indictment cannot be sustained. The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows that he has been legally convicted by a court of competent jurisdiction. He cannot, therefore, be again held to answer in this court for the same offense.”

In *The State v. Williams*, 10 Humph. 101, the defendant was indicted for stealing a horse, saddle, bridle, blanket and martingale, and it was decided to be but one offense. And see *Laupher v. The State*, 14 Ind. 327. In *The State v. Nelson*, 29 Me. 329, it was held that where the goods of several persons were stolen at the same time, so that the transaction is the same, one count in the indictment may embrace the whole; and in *Commonwealth v. Williams*, Thacher Crim. Cas. 84, the same doctrine is laid down. The court in its opinion quote, with approbation, the language of Lord HALE, 1 P. C. 531, where he says: “For it seems to me that if at the same time, the party steal goods of A. of the value of 6d., goods of B. of the value of 6d., and goods of C. of the value of 6d., being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties, and therefore, if in one indictment, they make it grand larceny.”

A case more nearly in point is *Ben v. The State*, 22 Ala. 9, where the defendant was indicted for administering poison at the

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same time to three persons. It was objected by counsel for the prisoner that the indictment was bad because it charged the commission of several offenses in one count. 1. That the prisoner administered the poison to the persons named. 2. That he caused the same to be administered. 3. That he administered and caused it to be administered to three individuals. But the court said: "We have examined these objections to the indictment with much care, and are constrained to hold that they are not well taken." See, also, *Rex v. Benfield*, Burr. 980; Whart. Crim. Law, §§ 390, 391, 392, 393, and authorities there cited; and *Jackson v. The State*, 14 Ind. 327.

In the case under consideration, we regard the allegations of the plea of former acquittal as stating in effect that the same act caused the death of Jacob Young and Nancy Jane Young, and therefore as bringing the case within the rule established by the authorities to which we have referred.

[The remainder of the opinion is devoted to questions of practice.]

Judgment reversed, and cause remanded.

JOEST, appellant, v. WILLIAMS.

(42 Ind. 565.)

Contracts of intoxicated persons.

The contracts of a person intoxicated at the time they were made are voidable, but not void, and to defend against a contract on the ground of drunkenness it must have been rescinded by restoring whatever was received as the consideration thereof. (*See note, p. 881.*)

THE appellant filed a claim against the estate of the appellee's decedent, consisting of a promissory note executed by the deceased to one Hutson, and by him indorsed to the appellant. The note was dated the 9th day of December, 1870, and was payable twenty-seven months after date, and was for two hundred and ten dollars.

The administrator set up as defenses to the note: 1. That the note was obtained by fraud and without any consideration.

2. That the same was obtained by fraud, in this, that said note was executed by the deceased when he was so intoxicated as to be wholly ignorant of making or signing the same. 3. That there was no consideration. 4. That the deceased never executed the said promissory note.

The plaintiff replied to the whole answer by a general denial, and for a second paragraph of his reply, confined to the second paragraph of the answer, he alleged that the consideration of the note was the purchase of certain real estate sold by the said Hutson, the payee, to the deceased, and that the deceased kept and retained said real estate until the time of his death, and that the same had been sold by the administrators of the estate of said deceased as part of the property of his estate.

Upon a trial of the issues by the court, there was a finding for the defendant, a motion made by the plaintiff for a new trial overruled, and judgment on the finding.

E. M. Spencer and W. Loudon, for appellant

A. P. Hovey and G. V. Menzies, for appellee.

DOWNEY, J. The error assigned in this court is the overruling of the motion for a new trial.

The reason for a new trial, as stated in the written motion, was, that the evidence was not sufficient to justify the finding of the court.

We think it essential to the proper understanding of what is decided by the court that we shall set out the evidence in this opinion:

David Robinson testified as follows: "I recognize the note in controversy. I wrote the name of the deceased to said note, at his request, and he made his mark thereto in my presence. I read the note to him before he signed it. He was pretty drunk. He could write his own name, and did generally write his own name. I did not write my name upon the note as an attesting witness until nearly eighteen months after it was executed."

Downey was killed in two or three days after the note was executed. The note was then read in evidence, and the bill of exceptions informs us that, it appearing that the note had not become due at the time of trial, it was agreed between counsel that no

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objection should be raised on that account, but that if the claim should be allowed it should be paid at maturity.

Richard H. Hutson testified as follows: "I am the payee of the note. It was executed in my presence. I sold a house and lot in Wadesville to the decedent, and in consideration therefor the decedent, Downey, gave me two notes, and this note in question for the interest thereon. This note was a part of the consideration for the sale of said house and lot. I executed to him a deed for the house and lot, and he kept it in his possession until he died. I transferred the note to the plaintiff. Downey was pretty drunk when he signed the note, too drunk to write his own name. The execution of the note by him was in pursuance of the contract previously made between us. The next morning after he signed the note I met him in Wadesville, and asked him how he liked his trade. He said he was perfectly satisfied with the trade, and intended to marry in a few days and move into the house. At this time he was not much drunk. In two days afterward he was killed. He did not in this last conversation mention the note particularly, but the note was given by him to carry out the agreement first made between us. The decedent could write his name." This was all the plaintiff's evidence.

Benjamin Gwaltney, on behalf of the defendant, testified as follows: "I knew the decedent well. I have seen him write often, but never saw him make his mark. I know nothing else about this matter, except what Mr. Cross told me." This was all the evidence given in the case.

The defense that the note was given without consideration is not sustained by the evidence. On the contrary, it seems to have been given for a valuable and sufficient consideration. Counsel for the appellee call attention to that part of the testimony showing that the note in question was given for the interest on the other two notes, and suppose that Hutson had received full value for the house and lot in the other two notes, and when the deceased was intoxicated got him to give this note to obtain additional pay when none was due. It does not appear that this note was given at a different time from that at which the other two notes were given. Nor does it appear that it was not. It was given, however, for interest on the other two notes. It is probable, or possible, to say the least, that the other two notes were given for the principal of the purchase-money of the real estate, and that the note in question

was given at the same time for the interest which was to accrue. But if this note was given after the giving of the other two for the interest that had already accrued, it would not, in either case, be without consideration.

We think there can be no question but that the deceased executed the note. There is no conflict in the evidence as to this. That the deceased could write, but on this occasion chose to make his mark and not to write his name, is a circumstance which can not control the positive uncontradicted evidence that the signature was written to the note at his request, and that he made his mark thereto in the presence of the witness.

Upon the question as to the other ground of defense there is more room for doubt; that is, whether or not the maker of the note was so much intoxicated as to be incapable of binding himself by the contract. But see *Reinskopf v. Rogge*, 37 Ind. 207. It may be said in this connection, that that part of the reply to the second paragraph of the answer which alleges that the real estate for which the note was given had been sold by the administrator of the deceased, was wholly unsupported by the evidence. The circumstance that on the next day after the note was given, when he was "not much drunk," he expressed himself perfectly satisfied with the trade, cannot have much weight in the case. Counsel for the appellee argue the case, in part, as if there was an answer in showing that the note had been obtained by fraud. But this is a misapprehension. While it is said in one or two of the paragraphs that the note was obtained by fraud and without consideration, we cannot regard that part of these paragraphs which speaks of fraud as amounting to any defense at all. Fraud cannot be pleaded in this general way, but the facts constituting the same must be set out particularly. It is not enough to say that a transaction was fraudulent, or that an instrument was obtained by fraud, but the facts must be alleged. *Curry v. Keyser*, 30 Ind. 214.

Conceding that the evidence shows that the deceased, when he executed the note, was too much intoxicated to bind himself by the contract, which, however, may well be doubted, there is a ground on which even that defense must be held to be insufficient, and that is, that the contract was not, on account of the intoxication of Downey, rendered absolutely void, but was only voidable, and that to avoid it he or his representative must have restored what was received by him under the contract, before he could be relieved

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from its obligation. In *McGuire v. Callahan*, 19 Ind. 128, it was said by this court: "The plaintiff seeks to avoid the instrument, on the ground of fraud and drunkenness. He cannot, however, treat the instrument as void, and, at the same time, as good. If the instrument is good, the plaintiff can maintain no action to recover the value of the property thus sold, if the defendant has performed the stipulations to be by him performed, which, for aught that appears, he has done. If the instrument is voidable, either on the ground of fraud or drunkenness, the plaintiff, before he can avoid it and maintain an action for the value of the property thus transferred, must place the defendant *in statu quo*, by refunding to him what he has advanced in pursuance of the contract. * * * This doctrine, in our opinion, is as applicable to contracts voidable on the ground of drunkenness, as those voidable on the ground of fraud. Drunkenness does not make a contract void, but only voidable. 1 Story on Cont., § 45, and authorities in note 4, p. 86."

We adhere to this authority as a correct exposition of the law on the subject, and hold that the note which is in controversy in this case is not, on account of the intoxication of the maker at the time of its execution, absolutely void, but only voidable. It follows, according to a well-settled rule of law, that to enable the maker or his representative to defend successfully on that ground, there must have been a rescission of the contract, by placing the parties *in statu quo*. As it appears that the maker of the note, as alleged in the second paragraph of the reply, received a deed of conveyance for the real estate for which, in part, the note was given, and it is not alleged or shown by the evidence that he or his representatives ever reconveyed the title, or in any way properly rescinded the contract, the court should have found for the plaintiff upon the evidence, instead of finding for the defendant.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

Judgment reversed and new trial ordered.

NOTE. — When drunkenness is a defense to a promissory note, see *Müller v. Finley*, 13 Am. 306 (26 Mich. 449); *State Bank v. McCoy*, 8 Am. 246, and note 251 (69 Penn. St. 994). — REP.

Davis v. Statts.

DAVIS V. STATTS.

(43 Ind. 108.)

Surety—when liable though principal be not—Promissory note of married woman.

To an action on a promissory note, the defense was that the defendants executed the note as sureties, that no consideration moved to them and that the principal maker was a married woman, and so not liable, of all which plaintiff had notice. *Held*, that the sureties were liable on the note, there being no fraud, duress, or deceit on the part of the payee in procuring said note.

SUIT by the appellee, Statts, against William M. Davis, Milton L. Davis, Daniel C. Rich and Esther A. Rich, on the following note :

“\$898.00. March 18th, 1872. Ninety days after date, we promise to pay to the order of Oliver P. Statts, eight hundred and ninety-eight dollars, value received, waiving valuation and appraisement laws, drawing interest at the rate of six per cent. Esther A. Rich, William M. Davis, Daniel C. Rich, Milton L. Davis.”

The complaint was in the usual and proper form. Esther A. Rich answered, that at the time of giving the note, she was a married woman, and that she still continued such married woman, which facts were known to the payee of the note. This answer was demurred to for want of sufficient facts, which was overruled. From this time she was left out of the case, except that she had judgment for costs. The other defendants, Daniel C. Rich, Milton L. Davis and William M. Davis, answered, that they “admit the execution of the note herein sued on, but say that the same is void, and that they are not liable on the same, for the reason and on account of the matters and things herein set forth. Defendants represent and say, that the said note was made and executed by defendant Esther A. Rich, as principal, and the said defendants Daniel C. Rich, Milton L. Davis and William M. Davis, signed said note as sureties to defendant Esther A. Rich, and that no consideration for the same moved to said sureties. All of which was well known to said plaintiff at the time he received said note. Defendants further say that at the time defendant, Esther A. Rich, made and executed said note, she was and still is a married woman,

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and living with her husband, and had never been authorized by any court to contract; and plaintiff well knew at the time he accepted said note that said defendant Esther A. Rich was a *feme covert*, and that the consideration for the same moved to said principal."

To this answer, a demurrer, for want of sufficient facts was sustained, and these three defendants failing and refusing to answer further, judgment was rendered against them for the amount of the note.

J. B. Morris, for appellant.

L. D. Stubbs, for appellee.

PETIT, J. This case presents the sole and only question as to whether the sureties of a married woman, who is not herself liable, on a promissory note, are liable to the payee, all parties, payee, principal, and sureties, knowing that the principal was not liable. We hold that the sureties are liable on such note, where there is no fraud duress, deceit, violation of law, or public policy, on the part of the payee, in procuring said note, and the following authorities fully sustain this ruling; *Harris v. Huntbach*, 1 Bur. 373; Addison on Cont. 37; Chitty on Cont. (10th Am. ed.), 547; 2 Pars. on Cont. 4; *St. Albans Bank v. Dillon*, 30 Vt. 122; *Kimball v. Newell*, 7 Hill (N. Y.), 116; *Smyley v. Head*, 2 Rich. 590; *Whitworth v. Carter*, 43 Miss. 61; *Jones v. Crosthwaite*, 17 Iowa, 393; *Stillwell v. Bertrand*, 22 Ark. 375; 1 Pars. on Notes and Bills, 244.

The appellant cites and puts great stress on the case of *Osborn v. Robbins*, 36 N. Y. 365, and similar cases, to sustain their view of the question, that a surety is not liable further than the principal, and that whatever discharges the principal discharges the sureties. This case is one in which the note was procured by duress, in violation of law, and contrary to public policy, morality, and justice; and it can have no weight, or be an authority, in the case before us.

The judgment below is in all things affirmed, at the costs of the appellants.

Judgment affirmed.

State ex rel. Lockhart v. Hauss.

STATE ex rel. LOCKHART v. HAUSS.

(48 Ind. 105.)

Office — resignation — when cannot be withdrawn.

A sheriff sent to the governor a written resignation of his office to take effect immediately, which he afterward withdrew, with the governor's consent, and before the office was filled. *Held*, that the withdrawal was void, and the office vacant.

FROM the Gibson circuit court.

D. F. Embree and A. C. Donald, for appellant.

C. A. Buskirk and O. M. Welborn, for appellee.

OSBORN, J. The relator of the plaintiff claims to be sheriff of Gibson county. The appellee is in possession of the office. The information is prosecuted for the purpose of excluding the appellee from the office, and to require him to surrender it to the relator. A demurrer was sustained to the complaint. Proper exceptions were taken, and the errors assigned raise the question of the right to the office.

The complaint states substantially that the relator was elected sheriff of Gibson county, at the October election, 1870, received his commission, was duly qualified, and entered upon the discharge of his duties. On the 16th day of June, 1871, he tendered his resignation of the office in writing, and forwarded it to the governor by mail, by whom it was received on the next day. He also filed in the office of the auditor of the county of Gibson a written notice, addressed to the board of commissioners of that county, informing the board that he had forwarded his resignation to the governor, to take effect from that date. On the 16th day of June, and before the governor had received the resignation, the auditor issued a notice to the commissioners to meet in special session on the 19th day of the same month. Before the commissioners met, under the call; the relator determined to retain the office and not resign, and before his notice to the board had been presented to or laid before them, as a board, he did, on the day fixed for their meeting, inform

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the auditor and one of the commissioners that he had withdrawn his resignation and notice, and did on the same day, by telegraph to the governor, withdraw his resignation, in which withdrawal the governor concurred. The commissioners met and appointed the appellee sheriff, who] qualified, entered upon the discharge of the office, and claims to and does actually deprive the relator of the same.

It is claimed by the appellant that the relator had a right to recall his resignation at any time before it was accepted, and even after that, by the consent of the governor, when no new rights had intervened. *Biddle v. Willard*, 10 Ind. 62, is relied upon to sustain the position. That was the case of a prospective resignation, and it was in reference to such a resignation that the remark was made by the judge, which is relied upon in this case. On page 66, he says: "Hence, a prospective resignation may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and for the reason that it is not accompanied by a giving up of the office — possession is still retained, and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation — may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted he may make the withdrawal by the consent of the authority accepting, where no new rights have intervened."

In the case at bar there was an actual, present resignation of the office, to take effect on that day, transmitted to, and received by, the officer to whom the law declares the resignation shall be forwarded (§ 5, 1 G. & H. 246), and a notice given to the body authorized to fill the vacancy and appoint a successor. § 8, same vol. and page. He had thus, in the form and according to the rules prescribed by law, given up the office and renounced all further right to use it, and having once vacated the office by resignation, could not take it back again. *Yonkey v. The State*, 27 Ind. 236-41. The governor could not and did not attempt to re-instate him in his office. The statute has designated the governor as the officer to whom a sheriff shall transmit the resignation of his office. It nowhere confers upon him the power of permitting a withdrawal. He is appointed by law to receive the resignation. That, in the absence of any other authority or direction, implies a direction to retain and keep it.

Our conclusion is, that when an officer has transmitted his written resignation of an office to, and it has been received by, the officer or authority appointed by law to receive it, to take immediate effect, he cannot withdraw it, and that there is a vacancy to be filled by the proper authority.

The judgment is affirmed, with costs.

KIRLAND V. STATE.

(48 Ind. 144.)

Assault and battery — what amounts to — touching the person.

In a prosecution for an assault and battery, the court charged the jury that if the defendant beat the prosecutor's horse while being driven by the prosecutor, he was guilty. *Held*, error, as the beating of a horse did not, in law, amount to a battery on the prosecutor.

PROSECUTION for an assault and battery commenced before a justice of the peace. The affidavit charges the appellant with having, at Marion county, on the 28th day of February, 1878, unlawfully, and in a rude, insolent, and angry manner, touched, etc., Charles Bein.

The appellant was tried and found guilty by the justice. The case was appealed. It was tried on appeal in the Marion criminal court, where the State again obtained a verdict. The appellant moved for a new trial, which was overruled; and the judgment was rendered on the verdict.

J. W. Gordon, T. M. Browne, R. N. Lamb and J. N. Kimball,
for appellant.

J. O. Denny, attorney-general, for the State.

BUSKIRK, J. The error assigned is the overruling of the motion for a new trial. A reversal of the judgment is asked mainly upon the ground that the court gave an erroneous instruction to the jury.

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The instruction complained of as erroneous is as follows :

“2. To constitute a battery, the touching need not be of great force; a mere touching is sufficient, if it be unlawful, and be done in a rude, or an insolent or angry manner. But this touching must be unlawful. A man may defend the possession of his estate and of his chattels by such reasonable force as may be necessary to that end; and if, in this case, you believe from the evidence that, at the time of the alleged assault and battery, Charles Bein was trespassing upon the lands of the defendant, and engaged in carrying away, without right, the corn of the defendant, the defendant had the right, after requesting Bein to depart, and a refusal on his part to leave the property and premises, to use such reasonable force as was necessary to eject him from the premises, and protect his personal property; and if the defendant, in thus protecting his property and possession, touched Bein or assaulted him only so much as was reasonably necessary to secure the object aforesaid, he is not guilty, and you should so find. But if the jury believe from the evidence that defendant rented the fields referred to in the evidence, no certain time being fixed for the termination of the lease to Charley Bein, to be cultivated in corn, upon the shares, to be gathered by Bein, one-half to be delivered to defendant, and the other to be retained by the renter or tenant for his share, the mere fact that an agreement was made in the fall after, by which it was agreed that the tenant (Bein) take for his share of the corn the south field, and defendant the north field as his share, except three acres in the south field, this would not terminate the lease of itself, unless it was agreed between the parties that the lease should terminate. Nor would such facts authorize the defendant to forcibly eject Bein from the field, because he was gathering more corn for his own use than he was entitled to by such agreement; and if, under such circumstances, the defendant struck or beat Bein, while he was gathering corn in the field, or while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner with a stick, the defendant is guilty of an assault and battery.”

The statute says: “Every person who, in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery,” etc. 2 G. & H. 459.

It is quite clear, therefore, that no assault and battery can be committed, unless one person touches another unlawfully, and in a

rude, or insolent or angry manner. The affidavit charges that the appellant thus touched Charles Bein. To sustain this charge, the evidence must show the unlawful touching, etc., of Charles Bein. The charge excepted to, however, instructs the jury, that, if the defendant struck Charles Bein's horse with a club, in a rude or angry manner, while Bein was driving his team, in the act of gathering corn, etc., the defendant is guilty of an assault and battery. In this instruction the court deems the touching of Bein wholly immaterial and unimportant; to strike Bein's horses is to strike him, that is, if they were struck with a club, and it was done while he was driving his team in the field, in the act of gathering corn. To strike the horses of Bein was in no legal or logical sense to strike him. True, if the blow touched both Bein and his horse, the touching would be an assault and battery on Bein, not because of his horse, however, but for the reason that it touched him.

And if the appellant struck and drove Bein's horse, or any other horse, against him violently, unlawfully, and in a rude, etc., manner, then he would be guilty, not because he struck the horse, but for the reason that he struck Bein by running or pushing the horse against him. If Bein was so connected with his horses, when they were struck, that the blow took effect on his person as well as that of the horses, then the person striking the blow would be guilty.

Bishop, in his work on Criminal Law, in section 72, volume 2, says: "The slightest unlawful touching of another, especially if done in anger, is sufficient to constitute a battery. For example, spitting in a man's face, or on his body, or throwing water on him, is such. And the inviolability of the person, in this respect, extends to every thing attached to it."

Russell on Crimes, volume 1, page 751, says: "The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite. * * * And it seems that it is not necessary that the assault should be immediate; as where the defendant threw a lighted squib into a market-place, which, being tossed from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. And the same has been holden where a person pushed a drunken man against another."

Greenleaf on Evidence, in discussing the question of battery says: "A battery is the actual infliction of violence on the person

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This averment will be proved by evidence of any unlawful touching of the person of the plaintiff, whether by the defendant himself, or by any substance put in motion by him. The degree of violence is not regarded in the law; it is only considered by the jury, in assessing the damages in a civil action, or by the judge in passing sentence upon indictment. Thus, any touching of the person in an angry, revengeful, rude or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile, or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner, to detain him, is a battery. So, striking the skirt of his coat or the cane in his hand, is a battery. For any thing attached to his person partakes of its inviolability."

Blackstone defines a battery as follows:

"3. By battery, which is the unlawful beating of another. The least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner." 3 Cooley's Blackstone, 120.

Note four by Judge Cooley, on same page, reads as follows: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29, b. n. l.; id. 13 and 14, n. 3. Taking a hat off the head of another is no battery. 1 Saund. 14. It must be either willfully committed, or proceed from want of due care (Stra. 596; Hob. 134; Plowd. 19), otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy (3 Wils. 303; Bac. Ab. Assault and Battery, B.); but the absence of intention to commit the injury constitutes no excuse, where there has been a want of due care. Stra. 596; Hob. 134; Plowd. 19. But if a person unintentionally push against another in the street, or, if, without any default in the rider, a horse runs away and goes against another, no action lies. 4 Mod. 405. Every battery includes an assault (Co. Litt. 253), and the plaintiff may recover for the assault only, though he declares for an assault and battery. 4 Mod. 405."

Counsel for appellee have referred us to the following adjudged cases as supporting the instruction under examination: *Respublica*

v. *De Longchamps*, 1 Dallas, 111; *The State v. Davis*, 1 Hill (S. C.), 46; *Dubuc De Marentille v. Oliver*, Penning, 379; *The United States v. Ortega*, 4 Wash. (C. C.), 531.

The case referred to in Dallas was a prosecution under the laws of nations for an assault and battery upon the minister of the French government resident in this country. It was proved upon the trial that the defendant struck with a cane the cane of the French minister. The court say: "As to the assault, this is, perhaps, one of the kind, in which the insult is more to be considered than the actual damage; for though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and, among gentlemen, too often induce duelling, and terminate in murder. As, therefore, any thing attached to the person, partakes of its inviolability; De Longchamps' striking Monsieur Marbois' cane, is a sufficient justification of that gentleman's subsequent conduct."

The case referred to in Pennington, *supra*, was a civil action for a trespass committed by the defendant on the property of the plaintiff, by striking with a large club the plaintiff's horse, which was before a carriage in which the plaintiff was riding. The court say: "To attack and strike with a club, with violence, the horse before a carriage in which a person is riding, strikes me as an assault on the person; and if so, the justice had no jurisdiction of the action. But if this is to be considered as a trespass on property, unconnected with an assault on the person, I think it was incumbent on the plaintiff below to state an injury done to the horse, whereby the plaintiff suffered damage; that he was, in consequence of the blow, bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing of him, or the like."

The above case being an action of trespass for an injury to the horse of the plaintiff, and not a prosecution for an assault, or an assault and battery upon the person of the plaintiff, we think that but little importance should be attached, or weight given, to the loose remark of the judge, that the striking of a horse attached to a carriage was an assault upon the person riding in the carriage.

The case of *The State v. Davis*, *supra*, was a prosecution for an assault upon an officer, in releasing from his custody a negro. The facts will sufficiently appear from the quotation which we

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make from the opinion of the court. The court say: "The general rule is, that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not necessary to an assault. It has, therefore, been held that beating a horse in which one is, striking violently a stick which he holds in his hand, or the horse on which he rides, is an assault; the thing in these instances partaking of the personal inviolability. *Respublica v. De Longchamps*, 1 Dall. 114; *Wambough v. Shank*, Penn. 229, cited in 2d part Esp. Dig. 173. What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and, legally speaking, the defendants had no right to retake him with force. As far as words could go, their conduct was rude and violent in the extreme. They broke the chain, with which the negro was confined to the bed-post, in which the prosecutor slept, and cut the rope by which he was confined to his person, and are clearly within the rule. The rope was as much identified with his person as the hat or coat which he wore, or the stick which he held in his hand. The conviction was therefore right."

We are inclined to the opinion that the chain and rope so connected together the prosecutor and negro, as to make the identification as complete as the hat or coat on the person or the stick in the hand. The ruling in the above case was based upon the close and intimate connection which existed between the prosecutor and the negro; but no such identity or connection between the prosecutor and his horses in the case in judgment is shown.

The case of *The United States v. Ortega, supra*, was a prosecution instituted by the United States, for the purpose of vindicating the law of nations and of the United States, offended, as was alleged, in the person of a foreign minister, by an assault committed on him by the defendant. The proof was, that the defendant seized hold of the breast of the coat of Mr. Salmon, the prosecuting witness, and retained his hold while he enumerated his cause of grievance, and until a third person came up and compelled him to release his hold.

The court said : " It was argued by the counsel for the defendant, that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offense ; and that nothing more is proved in this case, even by Mr. Salmon. It is very true that these acts may be done, very innocently, without offending the law. If done in friendship, for a benovolent purpose, and the like, the act would certainly not amount to an assault. But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount, not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger, or in a menacing manner, are considered by the law as assaults."

It is very obvious that the above cases do not support the position assumed by the counsel for appellee, but are in entire accord with the elementary writers from whom we have quoted.

The most accurate and complete definition of a battery that we have met with is that given by Saunders, and which has been adopted by most subsequent writers, and that is : " A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him." By this definition, it is an essential pre-requisite that the person must either be touched by the aggressor himself or by the substance put in motion by him. There must be a touching of the person. One's wearing apparel is so intimately connected with the person, as in law to be regarded, in case of a battery, as a part of the person. So is a cane when in the hand of the person assaulted.

But in the case under consideration, the court ignores all these things and instructs the jury to convict on proof alone of the striking of the horses of the prosecuting witness. It is not even necessary, according to this charge, that the prosecuting witness should have been in the wagon or holding the lines, or connected with or attached to the horses in any way. That Bein was driving his team and gathering his corn does not necessarily so connect him with the horses that the touching of the horses would be an assault and battery on him. He may have been, as is frequently done, driving his horses from one pile of corn to another, by words of command, without being in the wagon or having hold of the lines.

The law was correctly stated by the court in the first charge

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given to the jury. It was as follows: "Before you will be justified in finding the defendant guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant, at, etc., * * in a rude, or an insolent, or an angry, manner, touched Charles Bein."

In placing a construction upon the instruction complained of, it is our duty to look at all the instructions given on the same subject; and, if the instructions taken together present the law correctly and are not calculated to mislead the jury, we should affirm the judgment.

On the other hand, if the two charges are inconsistent with each other, if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to what was the law as applicable to the facts of the case, then the judgment should be reversed. *Somers v. Pumphrey*, 24 Ind. 231. The above rules have been applied by this court in civil cases. The rule laid down in criminal causes is as follows: "An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction, which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury." *Bradley v. The State*, 31 Ind. 492.

Construing these charges together, how do they stand? The jury are first told that, to justify a finding of guilty, they must be satisfied beyond a reasonable doubt that the defendant touched Charles Bein; and then, in the second charge, the court continues, that the defendant might lawfully employ reasonable force, etc., in defense of his possession or property, but that under circumstances hypothetically put by the court, Charles Bein had the right to be on the defendant's premises gathering corn," and if under such circumstances, etc., while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner, with a stick, the defendant is guilty of an assault and battery."

Plainly, then, the charge is, that the evidence must show the touching of Charles Bein by the defendant, but that if Bein is driving his team, etc., and the defendant strikes his horses (that is Bein's horses) with a stick, in a rude and angry manner, then, such touching of the horses is, in law, a touching of Bein, and the defendant is guilty of an assault and battery. Logically the charge states the law thus: Generally, to sustain a charge of assault and battery on A, it is essential to prove a touching of A by the

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defendant, but under certain circumstances, such as if A is driving his team, etc., and the defendant touches the horses of A, then, in that case, such touching of the horses is a touching of A, and if such touching of the horses is unlawfully done, and was made, etc., then the defendant may be found guilty of an assault and battery on A.

There was evidence tending to prove that the defendant struck Charles Bein. He and his two sons, Edward and Frank, so swear. The defendant swears he did not.

The following is briefly the evidence tending to prove the assault and battery upon the horses:

Charles Bein testified: "He hit my horses on the head with a big club about three feet long. * * * He struck my horses two or three times. * * * He was mad. * * * I was loading corn out of the piles; was loading up corn when he struck the horses."

Same witness on cross-examination testifies: "When he struck the horses, he struck them on the head, and they stopped, etc. Don't know who held the lines. Maybe my little boy held one and me the other. * * * He struck the horse next to me. * * * The team was made to stand when defendant struck the horses. * * * I was not in the wagon when he struck them."

Edward Bein testified: "Kirland hit the horses on the head, and they stopped. We were just going to drive out. My father was then standing on the ground near the wagon. Defendant put his hands on the horses to unhitch them from the wagon; tried to unhitch the traces. Just before that he struck the horses, when father was standing on the other side of the wagon."

Frank Bein testified: "At the time the horses were struck, father was in the wagon."

The defendant testifies, that he "didn't touch the horses, except that he attempted to unhitch them from the wagon."

It is apparent that there was evidence in the case to which the second instruction was applicable. The verdict being general, we are unable to determine whether he was convicted for touching the person of Bein or for striking his horses. It may be that the jury found the defendant guilty of striking the horses of Bein, for the defendant admitted that he attempted to unhitch the horses from the wagon, and consequently must have touched them, while he positively denies that he touched the person of the prosecuting wit-

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ness. Besides, there was evidence tending to impeach the character of Bein. The jury may, therefore, have doubted, reasonably, the guilt of the defendant in the striking of Bein, and found him guilty only of having "in a rude and angry manner struck the horses of Bein with a stick," while "he was driving his team in the act of gathering corn."

The second instruction was inapplicable to the evidence and was calculated to mislead the jury, and being erroneous, the judgment should be reversed.

The judgment is reversed; and the cause is remanded for a new trial in accordance with this opinion.

Judgment reversed and new trial ordered.

HELM V. FIRST NATIONAL BANK OF HUNTINGTON.

(48 Ind. 187.)

Constitutional law — Patents — State legislature cannot regulate contracts as to.

A State statute provided that any person taking a written obligation, the consideration whereof is a patent-right, shall, before such obligation is signed by the maker, insert in the body thereof "given for a patent-right." *Held*, unconstitutional, as interfering with the exclusive power of congress to regulate patents.

From the Huntington circuit court.

H. T. Helm and N. O. Ross, for appellant.

J. R. Slack, for appellee.

BUSKIRK, J. This is an appeal from a judgment of the court below, rendered on a promissory note, to which the appellant, the defendant below, pleaded, in substance, that the said note was given for a patent-right, or some interest in a patent; and that the said note was invalid and void, by reason of the omission to insert in the body of said note, above the signature, the words "given for a patent right," as required by a statute of the State of Indiana. 3 Ind. Stat. 364.

By the second section of the act referred to, it is provided, that

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any person who may take any obligation in writing, for which a patent-right, or right claimed to be such, shall form the whole or any part of the consideration, shall, before it is signed by the maker, insert in the body of the obligation, above the signature, the words "given for a patent-right."

The third section provides, that any person who shall take any obligation for a patent-right, without complying with the requirements of this act, shall be deemed guilty of a misdemeanor, and subject to a penalty therein provided.

The purposes of this case do not require a further statement of the provisions of the act referred to.

To the plea of the appellant there was a demurrer, which was sustained by the court below, on which ruling judgment was rendered against the appellant.

The appellant assigns for error the decision of the court below in sustaining a demurrer to the plea above set forth.

The case presents two questions:

1. Whether, under the provisions of such a statute as that which is above set forth, a note can be given and enforced which does not contain the words required by such statute. And,

2. This involves the further question, which has been raised, of the constitutional validity of the statute itself, so far as the making and taking of a note for a patent-right extend.

If the legislature of this State possessed the constitutional power to enact the law in question, there can be no doubt that a note taken in violation of its provisions would be illegal and void.

The solution of the second question depends upon whether the States have been prohibited by the federal constitution from legislating on the subject embraced in the act in question.

The eighth section of the first article of the constitution of the United States, which contains an enumeration of the powers granted to the federal government, confers on congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

It is insisted by counsel for appellee that the above grant of power confers upon the national government the exclusive power to legislate on the subject of patents, and that, consequently, the legislature of this State possesses no power to legislate on the subject.

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STORY, J., in delivering the opinion of the court in *Houston v. Moore*, 5 Wheat. 49, lays down certain rules of construction and interpretation which should be employed in determining whether a grant of "power to the national government is exclusive or concurrent." He says:

"The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution; and, on the other hand, we are bound to support that constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains.

"The constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance also to State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, unless where the constitution has expressly in terms given an exclusive power to congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States."

In *Gilman v. Philadelphia*, 3 Wall. 713, the rule is stated as follows: "The States may exercise concurrent or independent power in all cases but three:

"1. Where the power is lodged exclusively in the federal constitution.

"2. Where it is given to the United States and prohibited to the States.

"3. Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively."

MARSHALL, Chief Justice, in delivering the opinion of the court in *Sturges v. Crowninshield*, 4 Wheat. 122, says: "In considering this question it must be recollected that, previous to the formation

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of the new constitution, we were divided into independent States, united for some purposes, but, in most respects, sovereign. These States could exercise almost every legislative power, and, among others, that of passing bankrupt laws.

“When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been that the mere grant of a power to congress did not imply a prohibition on the States to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act on it.”

The same learned judge, in another portion of his opinion, uses the following language :

“It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States.”

The power in reference to patents and patent-rights is not exclusively vested in the general government, nor is it prohibited to the States. The case does not, therefore, fall within the first or second class of cases, *supra*, but comes within the third.

The federal government has, continuously, from the adoption of the constitution down to the present time, legislated on the subject of patents and patent-rights. Such legislation has covered the entire ground; for it has not only regulated the manner in which a patent may be obtained from the general government, but it has prescribed the manner in which such right may be sold

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and conveyed, and has imposed penalties for the infringement thereof. The power delegated to the general government having been exercised by congress, and as from the nature and subject of the power it cannot be conveniently exercised by the States, it must necessarily be exercised by the national government exclusively. We are of the opinion that the legislature of Indiana possessed no power to pass the statute under consideration, and it must, therefore, be held unconstitutional and void. This ruling is in accordance with the adjudged cases upon the same and similar statutes. See opinion of DAVIS, Justice, in *Ex parte Robinson*, 3 Ind. Stat. 365, in which case the learned judge, in passing upon the validity of the statute in question, uses the following language: "The property in inventions exists by virtue of the laws of congress, and no State has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a State could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of congress, which regulate its transfer, and destroy the power conferred upon congress by the constitution. The law in question attempts to punish, by fine and imprisonment, a patentee, for doing with his property what the national legislature has authorized him to do, and is, therefore, void."

The judgment is affirmed, with costs.

Judgment affirmed.

WILD v. DEIG.

(43 Ind. 455.)

Constitutional law — statutes authorising taking of lands for private roads unconstitutional.

A statute authorized the taking of lands by eminent domain for private roads on payment of damages. *Held*, unconstitutional.

ACTION by the appellant to recover damages, and to restrain the appellees from tearing down his fences, and opening a pretended private road through his land.

A. P. Hovey and G. V. Mensies, for appellant.

W. Harrow, W. M. Hoggatt and J. H. Laird, for appellees.

OSBORN, J. Two questions are presented for our consideration : 1st. The regularity of the proceedings of the board of county commissioners of Posey county in establishing the road. 2d. The constitutionality of the law under which it was established.

[We omit that part of the opinion relating to the first question as it is unimportant.]

The main question in the case is the constitutionality of the law authorizing the location of private roads.

The case of *Kissinger v. Hanselman*, 33 Ind. 80, is cited as deciding the question in favor of the law. In that case, the petition was for a "certain private road for the purpose of having access to the burial-ground known as," etc. The commissioners ordered the road to be opened by the appellee (the applicant for the road) on payment of damages; the damages were paid and the road opened, and the defendant obstructed the road. The court said, that "the road in question was a public highway, and, consequently, that the questions most pressed for the appellant are not in the case." That if it was only a private road, then half the highways in the State were of that class; void in their inception, if the right of eminent domain could not be exercised to take land for them, and not in any respect under the jurisdiction of the local authorities, nor to be opened or kept in repair by the public.

From the language used by the court in that case, we think the proviso in the section providing for private roads must have been overlooked. 1 G. & H. 366, § 49. In that proviso it is declared that the petitioner "shall open and keep in repair such road at his own expense." That section was amended by an act approved March 9, 1861. 3 Ind. Stat. 290. By that act any person or persons might have a private road laid out, * * * under regulations provided by law for the location * * * of highways, so far as such regulations might be applicable: "Provided, that such board of commissioners may order such private road to be laid out, * * * without any view, if there be no remonstrance against such petition: Provided further, that such petitioner or petitioners asking such road shall open and keep in repair such road

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at his or their own expense, and that such road may be either dirt, plank, macadamized, gravel, or railroad."

We think it manifest that the theory of the court was, that the public were to open the road and keep it in repair, and that it was under the jurisdiction of the local authorities, whereas by the statute such was not the case.

Mr. Angell in his work on the law of highways, says: "The word 'way' is derived from the Saxon, and means a right of use for passengers. It may be private or public. By the term 'right of way,' is generally meant a private way, which is an incorporeal hereditament of that class of easements, in which a particular person, or particular description of persons, have an interest and a right, though another person is the owner of the fee of the land, in which it is claimed." Angell on Highways, 1, 2. "Highways are public roads, which every citizen has a right to use." Id. 3. "A passage, road, or street, which every citizen has a right to use." Bouv. Law Dict.

The act to provide for the opening of highways recognizes and calls all public roads highways, and in all such cases viewers must be appointed; and before the commissioners can order the road to be opened as a highway, such viewers must find that it is of public utility. A private road is called a "private road" as contradistinguished from a public road or highway. No viewers are required unless a remonstrance is filed. When a highway is located, the board of commissioners shall order it opened and kept in repair, and the order shall be transmitted to the trustee of the township in which the location is made; and the trustee shall notify the proper supervisor to work the road. 1 G. & H. 393, § 18. When a private road is located, the petitioners shall open and keep it in repair at their own expense. They get no credit for the work done upon such road. It is made a penal offense to obstruct a public highway, and supervisors are liable to be fined for failing to keep the highways in their districts in repair. The statutes of this State recognize the distinction between public and private roads. One is for the use of the public and must be maintained at public expense; the other is, as its name indicates, private, for the use of the particular persons for whose benefit it is located, and must be maintained at their expense. It is not for, and cannot be used by, the public.

The constitutionality of the provision depends upon the power of

the legislature to authorize the appropriation under the right of eminent domain. In the case of *The Water Works Co., etc., v. Burkhardt*, 41 Ind. 364, it was said, that "the right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes, is inherent in the government. * * * It is to be exercised only when the public exigencies require it. * * * If the legislature attempts, under the power of taking property under the right of eminent domain, to take property confessedly not for public use, then the courts may prevent it." Mr. Cooley, in his work on Constitutional Limitations, says: "It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. * * * It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established." Cooley's Const. Lim. 530.

Bankhead v. Brown, 25 Iowa, 540, held that a law of that State, authorizing the location of private roads and appropriating private property therefor, was unconstitutional. DILLON, C. J., in his opinion in that case, says: "With respect to the act of 1866, we are of opinion that roads thereunder established are essentially private, that is, are the private property of the applicant therefor.

* * * Such road may be established upon the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe. The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private." *Sadler v. Langham*, 34 Ala. 311, held the same doctrine. After referring to the statutes, the court, on page 332, says: "Under an irresistible implication, springing out of the language employed in each of these statutes, there was an attempt made to confer authority to take the private property of some person or persons, other than the applicant, as a track for such road. This is a taking of private property. Is the use public? The statute speaks alone of private roads. They are to be opened and kept in repair at the expense of the applicant, and he alone is

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to make compensation to the owners of the land over which it passes. Their burdens are to be borne by him, and for their performance he can claim no exemption from work on public roads. We think it clearly appears that these uses are simply private; and there is nothing in the statute which authorizes public travel on such private roads. So far as the statutes assume to give authority to lay out such road over the lands of another without his consent, the statute is unconstitutional." *Nesbitt v. Trumb*, 39 Ill. 110, held that an act authorizing the establishment of private roads, so far as it undertook to appropriate private property, was unconstitutional; that the legislature was powerless to afford the means by which a private way could be established over another's land without his consent. *Dickey v. Tennison*, 27 Mo. 373; *Osborn v. Hart*, 24 Wis. 89; 1 Am. Rep. 161; *Taylor v. Porter*, 4 Hill (N. Y.) 140, and others, hold the same. The fact that the statute authorizing such ways declares that they shall be for the exclusive use of the applicant, does not in our opinion change his right. It is to be a private, not a public way, established and maintained at his expense. The public authorities have no control over it. It is as much his, as if he secured it by contract, instead of by condemnation.

Some of the courts have upheld laws somewhat similar to ours. The reasons given are not uniform. That such ways are branches of the highways and a part of a system, that the power has been exercised and undisputed for a long time, and that the public are interested in securing to every citizen a way to and from his land, are not, in our opinion, sufficient to authorize taking the private property of one and conveying it to another, either with or without compensation.

Concede that the public exigency requires that a way should be opened to every man's farm, and that the State may and should provide for the establishment of a public road or highway, to enable every citizen to discharge his duties, and travel to and from his farm; it does not follow that such ways should be private and owned by the party applying for them. If it would be of public utility to establish the road, then it should be a highway. If not, the right of eminent domain cannot be exercised to establish it. It is not the amount of travel, the extent of the use of a highway by the public, that distinguishes it from a private way or road. It is the right to so use or travel upon it, not its exercise.

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We refer to the following additional authorities, bearing upon the question: *Clack v. White*, 3 Swan. (Tenn.) 540; *Hickman's Case*, 4 Harring. (Del.) 580; *Perrine v. Farr*, 2 Zab. 356.

The judgment of the said Posey common pleas is reversed, with costs.

The cause is remanded, with instructions to sustain the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

NOTE. — *Taylor v. Porter*, 4 Hill, 140, is a leading case for the doctrine laid down in the principal case, and has been approved in *Baker v. Braman*, 6 Hill, 47; in *Embury v. Connor*, 3 N. Y. 511; in *Powers v. Bergen*, 6 id. 368, and by Chancellor KENT in a note to his Commentaries, 2 Kent (19th ed.), 339, note *f*. To avoid the difficulty, it was provided in the New York constitution of 1846, that private roads might be opened in the same manner as other ways; and the constitutions of Georgia and Michigan contain like provisions. That private ways for private purposes only cannot be established over the land of another without his consent, was held in the following additional cases: *Orear v. Crossly*, 40 Ill. 175; *Winkler v. Winkler*, 40 id. 185; *Dickey v. Tennison*, 37 Mo. 373; *Sadler v. Langham*, 34 Ala. 311; *Bankhead v. Brown*, 25 Iowa, 540; *White v. Clark*, 3 Swan. 230. Where, however, a way is *quasi public* — that is, opened to public use, although primarily designed for the benefit of an individual who pays all the damages — it has been held not obnoxious to the constitution. Such cases were *Ferris v. Bramble*, 5 Ohio St. 109; *Bell v. Prouty*, 43 Vt. 239; *Whittingham v. Bowen*, 23 id. 317; *Proctor v. Andover*, 43 N. H. 343. But in *Harvey v. Thomas*, 10 Watts, 65, and in *Pocopeon Road*, 16 Penn. St. 15, the constitutionality of private roads over private lands was upheld, though in the latter case without consideration.

Judge COOLEY says, in a note to his valuable treatise on Constitutional Limitations, page 531: "In the text we have stated what is unquestionably the result of the authorities; though if the question were an open one, it might well be debated whether the right to authorize the appropriation of the property of individuals did not rest rather upon grounds of general public policy than upon the public purpose to which it was proposed to devote it. There are many cases in which individuals or private corporations have been empowered to appropriate the property of others, when the general good demanded it; though the purpose was no more public than it is in any case where benefits are to flow to the community generally from a private enterprise." See, on the subject of the constitutionality of private roads, an elaborate article in 6 Am. Law Rev. 197. — RMR.

CASES
IN THE
SUPREME COURT
AND THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

JONES v. THE MECHANICS' FIRE INSURANCE COMPANY.

(33 N. J. [7 Vroom] 29.)

Fire Insurance—Proof of loss—Notice of defects in—Waiver—Mistakes in application—Evidence.

To comply with the condition of a fire policy, requiring as particular an account of the loss and damage as the nature of the case will admit, where all the books, invoices and vouchers are preserved, the insured must give, in his preliminary proofs, full and exact particulars of his loss.

If the insurers intend to insist upon defects in the preliminary proofs, they should notify the policy holder that he may amend them in time, if he can.

If they are silent, or object on other grounds, it is evidence of waiver.

If, after reasonable time to examine the proofs presented and received, the insurers do not object to them, but are silent until their time for payment has expired, or is about to expire, such delay shall be evidence, from which the jury may infer a waiver of the defects.

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Fraud and false swearing will avoid the policy ; but mere mistakes in stating facts, which do not, in themselves, annul its conditions, and do not appear to be willful misrepresentations, will not defeat the action.

The ledger and cash book of the insured may, in some cases, be received in evidence.

A witness, in the same business in another place, and where the conditions are unlike, cannot be asked the proportion between his stock and sales, to raise a presumption of fraudulent statement by the plaintiff. (*Insurance Co. v. Weide*, 11 Wall. 488, distinguished.)

ON motion for new trial.

This action is founded on two certain policies of insurance, and the several renewals thereof, issued by the defendants to the plaintiff ; one dated April 16, 1866, for \$3,000; the other dated January 24, 1867, for \$1,500. Both are on the plaintiff's stock of merchandise, consisting of groceries and liquors of all kinds, and all such articles as are usually kept in a wholesale and retail grocery and liquor store, in his store at Morristown.

The policies are in the usual form, and, in the body of each, the company promise and agree to make good unto the insured all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property within the term of insurance ; the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen ; and *to be paid within sixty days after due notice and proof thereof made by the insured, in conformity to the conditions annexed to the policy*, unless the property be replaced, or the company have given notice to rebuild or repair the damaged premises, etc.

The store, with nearly all the goods of the plaintiff contained therein, was destroyed by fire March 2, 1871.

The policies were continued, by renewals, beyond the time of the fire ; a notice of loss, and account of the loss and damage, accompanied with the oath of the plaintiff, were served on the defendants.

The total loss claimed by this statement was \$46,510.74. Total insurance, in different companies, \$28,000.

Action was brought by the plaintiff, July 25, 1871, for the amounts of the two above-named policies of the defendants, and verdict rendered for the sums therein named with interest.

Upon certain rulings of the justice at the circuit, and exceptions to his charge, and because the verdict is alleged to be against the weight of evidence, and unjust, a motion for a new trial was made.

The further particulars will appear in the opinion of the court.

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Vanatta, for plaintiff.

C. Parker and *Williamson*, for defendants.

SCUDDER, J. It has been often decided that such policies of insurance are contracts of indemnity, in case of loss by fire, upon compliance with the terms and conditions therein contained. They are therefore to be construed as other contracts between competent parties, to fulfill their intentions as they have expressed them in writing.

In this case, it is first objected that the court erred in refusing to nonsuit the plaintiff, because due notice and proof of the loss, in conformity to the conditions annexed to the policies, were not made sixty days prior to bringing the action.

Such proof and notice are, by the terms of the policies, conditions precedent, and the company have sixty days to pay the loss, after notice and proof are made.

By article 9, of the policies, "Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the company," etc. Notice was given to the defendants by Edwin Ross, an insurance agent, on the day after the fire, and they have not objected to the form or the time of this notice at the trial of the cause.

In the same article it is stipulated that, "as soon as possible, they shall deliver as particular an account of the loss and damage as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath or affirmation, declaring the said account to be just and true."

An account of the loss and damage, verified by the oath of the plaintiff, was received by the defendants, April 3, 1871. The time seems longer than would be necessary, but meanwhile, the adjusting agent of the defendants examined the premises, had conversations with the plaintiff, and saw his books May 16, in the office of plaintiff's attorney. These books appear to have been the day-book, ledger and cash-book. From these, an account of cash sales and credits was taken off. The blotter was not shown. The inventory made by the plaintiff in April, 1870, which is copied in his proof of loss served on the defendants April 3, 1871, was shown to Colwell, who represented one of the other companies, March 6, 1871, but does not appear to have been seen by Winter-

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ton, the agent of defendants. These agents were, however, examining the facts together. After the examination of the books, May 24, 1871, A. J. Winterton, special agent to adjust for the several insurance companies having policies on plaintiff's goods, addressed a letter to him, by which he was notified that papers purporting to be proofs of loss, and served on said companies, having reference to the fire which occurred March 2, 1871, which were served in the month of April next succeeding, were, upon careful examination, found to be insufficient and unsatisfactory, in that—

1st. The account of his purchases was without dates, and was not in detail, and did not furnish, as required, "a particular account" of the loss.

2d. The account of goods sold for cash and credit was largely below the real amount shown by his books of account. It was further stated, "that by the above the insurance companies waive no rights under their several policies of insurance, and modify no objections to your claim for loss that might arise from other matters, but first wish your proof amended and completed, as required."

This letter is a distinct objection to the preliminary proof of loss, because it does not give a particular account, and the purchases given are without date, and not in detail. It does not allege that the proofs were not made in time, nor has this been insisted upon at the trial. Upon looking at the preliminary proofs delivered to the defendants, April 3, 1871, we find them to consist, first, of the certificate of the nearest notary, pursuant to the condition of the policies; second, *Schedule A*, an inventory of goods, April, 1870, belonging to Samuel Jones, Morristown, N. J. This is itemized into named articles, quantities, and prices carried out, and amounting in all to \$43,241.00; third, *Schedule B*, goods bought by Samuel Jones from April 1, 1870, to March, 1871. In this, the names of the parties from whom the purchases were made, and the amounts purchased of each, are given; but there are no dates, and the articles purchased are not named. Thus "Geo. W. Elder & Co., \$1386.96," and others following in like form. In several the articles are given, with amounts, but no names; in others, the places where purchased. The amount foots up \$21,961.39. *Schedule C* contains the goods saved from the fire, amounting to \$465.75; *Schedule D*, amount of inventory taken April, 1870, \$43,241.00; goods bought since April 1, 1870, to March, 1871, \$21,961.39—

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total, \$65,202.39. Deducting goods sold from April, 1870, to March, 1871, \$22,782.37; less twenty per cent profits, \$4,556.47 — \$18,225.90; balance, \$46,976.47; goods saved from fire, \$465.75 — leaving a total loss of \$46,510.74. *Schedule E* shows the policies of insurance on the goods of plaintiff.

The objections in the letter of May 24 are to *Schedule B*, and the amount of sales given in *Schedule D*. The first is alleged to be incomplete; and the second, false.

The plaintiff returned answer to this letter, served June 6, 1871, that without admitting there was any insufficiency in the proofs of loss, but to give all information in his power, he furnished the particulars, so far as he was able, of the bills of purchases mentioned in *Schedule B*, and also admitted that the balance of sales on *Schedule D* should be \$21,025.46, instead of \$18,225.90.

The other particulars are copies of invoices, stating also additional purchases, which were omitted in the original proof.

July 20, 1871, A. J. Winterton, special agent for the several insurance companies, by letter to the plaintiff, made a formal demand upon him for a written elimination of the inventory of April, 1870, as furnished in his several proofs of loss, showing what property therein enumerated he claimed was inventoried by the United States government, and what property therein enumerated he claimed *was not* inventoried by the United States government, at the time of the seizure made; also, a demand on him for a written statement, giving the location and quantities and quality of stock on the premises at the time of the fire.

To this formal demand the plaintiff, by his counsel, on July 21, 1871, answered, refusing to comply.

July 25, 1871, this action was brought to recover the amounts insured by the defendants. The seizure referred to in the last communication was made by the United States internal revenue officers, in November, 1869, for alleged violation of the revenue laws, and was continued until March, 1870. The inventory named was that made by these officers at the time of seizure.

These facts must be stated and considered in their order, to determine whether the action was prematurely brought.

The defendants insist that the action could not be brought until sixty days had elapsed after June 6, when the additional particulars were given.

This depends, in the first place, upon the sufficiency of the proof

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of loss served April 3, 1871. It must appear to be as particular an account of the loss and damage as the nature of the case will admit.

This has often been characterized as a harsh rule, but with the modification that the account shall only be as particular as the nature of the case will admit; this is hardly just. It is, however, the contract between the parties, and in the many cases to be found in the books, the courts have steadfastly held the insured to a compliance with it.

In cases where the fire has not only consumed the goods insured, but all books and vouchers from which an account could be made, the insured has not been held to do what was vain and impossible, but only to such performance as the nature of the case would admit. *Norton v. R. & S. Ins. Co.*, 7 Cow. 645; *Mason v. Harvey*, 8 Ex. 819; *Roper v. Lendon*, 1 E. & E. 825 (102 E. O. L.)

In the present case, the plaintiff's books were saved; he had many of the invoices and vouchers for his purchases between April 1, 1870, and March, 1871; and others could be easily procured. I think, therefore, the nature of his case admitted of full and exact particulars. These he did not give in Schedule B. He made no statement of the articles purchased, or the times when they were bought. The names of the persons from whom the goods were alleged to have been bought, and the gross amounts, would not enable the insurers to test the accuracy of the account delivered to them. It would have imposed no great additional burden upon him to state in his first proofs the items of his several purchases, so far as he had or could obtain vouchers for the same, as was done in *the subsequent proofs*. The sales being entered each day as cash, I think are sufficiently specified in the gross amounts, as there could be no object in giving the amount of each day's sales, if it were possible so to do.

In *Lycoming County Ins. Co. v. Updegraff*, 40 Penn. 311, the gross amount of the inventory at the close of the year, and of purchases up to the date of loss, were taken from the books, and stated together as a total sum. This was held to be insufficient. This case is different, in containing a particular account of the inventory, and partial statement of the purchases carried out in separate sums, but still the full particulars, which were important for the defendants to know, and which the plaintiffs had it in power to give, were not rendered.

A detailed list of the articles lost, where this is practicable, is the

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intent of the parties, and courts should only relax the requirement where the nature of the case does not admit of such particularity. *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner's O. C. 434. The plaintiff, however, claims that if this be so, the defendants by their acts have waived a strict compliance with this condition. In many cases this subject of waiver is considered, and different conclusions have been reached by the courts.

In *Roumage v. Mech. Ins. Co.*, 1 Green, 110, the court held where the certificate of the nearest clergyman was defective in not setting out the amount of the loss, and the company resolved that they would not pay the claim made by the insured, or any part thereof, believing that it was founded in an attempt to defraud the company, that this resolution, and the silence of the company in regard to the defect in the certificate, was not a waiver of such defect.

Other cases have held that the company will be considered as waiving the informality in the notice, if, when the notice is given, they do not object to the form of it, but refuse to pay on other distinct grounds. *Schenck v. Mercer Ins. Co.*, 4 Zab. 447; *Francis v. Somerville Ins. Co.*, 1 Dutch. 78. But upon the point that the defect is not waived by receiving it without objection, there has been no other decision in this court until recently.

Upon reading the opinions in that case, it will appear that the court differed, and reluctantly yielded to the great authority of Chief Justice MARSHALL, in *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25. But this case, upon rehearing (10 Pet. 507), was virtually overruled, and again in *Taylor v. Merchants' Ins. Co.*, 9 How. 404, most decidedly disapproved.

The first two cases are commented upon by Chancellor WALWORTH, in *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 401, and the good sense of the rule, as held in the New York courts, was vindicated. This is stated in his language, as follows: "Good faith on the part of the underwriters, in such a case, requires that if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprise the assured that they consider the same defective in that particular, or to put their refusal to pay upon that ground as well as others, so as to give him an opportunity to supply the defect before it should be too late; or if he neglects so to do, then silence should be held a waiver of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy."

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These cases, as in *Roumage v. Mechanics' Ins. Co.*, relate to the fact of the preliminary proofs requiring the certificate of loss from the nearest magistrate; but other cases have extended the doctrine to the clause requiring the insured to give notice of the loss forthwith, and to render a particular account within a limited time, and other preliminary proofs. *McLaughlin v. Mut. Ins. Co.*, 23 Wend. 525; *Gilbert v. N. A. Ins. Co.*, id. 43; *Norton v. R. & S. Ins. Co.*, 7 Cow. 645; *Francis v. Ocean Ins. Co.*, 6 id. 404; *Cornell v. Le Roy*, 9 Wend. 163; *Bodle v. Chenango Ins. Co.*, 2 N. Y. 53; *O'Neil v. Buffalo Ins. Co.*, 3 id. 122; *Bumstead v. Dividend Ins. Co.*, 12 id. 81; *Kimball v. Hamilton Ins. Co.*, 8 Bosw. 495; *Underhill v. Agawam Ins. Co.*, 6 Cush. 440; *Brewer v. Chelsea Ins. Co.*, 14 Gray, 203; *Angell's L. & F. Ins.* 244, etc.

In *Priest v. Citizens' Ins. Co.*, 3 Allen, 604, the court in stating the distinction between waivers of matter of form and substance, say approvingly: "It is said that stipulations as to the preliminary proofs do not touch the substance or essence of the contract; but relate only to the form or mode in which the liability of the company shall be ascertained and proved. Besides, such preliminary proofs must necessarily be submitted to the officers of the corporation, who must pass on its sufficiency, and it therefore comes within the scope of their authority to say whether proof of the losses is sufficient. It may be added, that in ascertaining and settling losses, they frequently act upon personal investigations by themselves or their agents, and thus obtain knowledge that renders the preliminary proofs wholly immaterial." It was held there, that there was evidence to go to the jury, showing not only an implied but an express waiver.

The case of *Shawmut Co. v. People's Ins. Co.*, 12 Gray, 535, denies the authority of a special agent to waive these proofs, but admits that the president of the company may. But as the ruling of the court in that case may be thought to be against the principle above stated, it is worthy of notice that it cites 2 Pet. 53, as an authority upon which it is based. So it will be found that courts of other states, that have held differently, have followed this case. See *Beatty v. Lycoming Ins. Co.*, 66 Penn. 9; *Keenan v. Missouri Ins. Co.*, 12 Iowa, 126.

The conditions of insurance policies are numerous, varied and minute in details. These are doubtless essential for their protection against fraud, and for their complete security; but they are

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perplexing to persons not familiar with their requirements and construction. To prevent sharp practice and unfair advantage from a superior knowledge, it seems most just, and without imposing an undue burden on the insurance companies, to hold that when the preliminary proofs are received, if there are defects, they shall so state to the insured, that he may amend them in time, if they can be amended. If they intend to deal fairly with an honest loss, why should they not so state? If they believe the claim of loss is a fraud, let them so state, and contest it on that ground. The interests involved are so great, so many persons hold all they possess dependent on these securities, that both insurers and insured should be held to the utmost good faith; and such has been the manifest purpose of the courts.

A recent case in our court (*Basch v. Humboldt Ins. Co.*, 6 Vroom. 429) has settled this construction, so far as the question was involved, in the determination of that case.

In the present case there was silence on the part of the insurers up to a certain time, and then they objected to the particulars given in one of the schedules, which were imperfect. This raises a further question, whether the insurer may wait until his sixty days' credit for payment is about to expire, and then object, and upon new particulars being given, claim an extension of sixty days longer, and so continue to prolong the payment, from time to time, as new defects may be discovered. If he may do it once, he may do it again and often. To prevent such abuse of this right to object, which the insurer undoubtedly has, it must be held that if, after a reasonable time to examine the preliminary proofs presented and received, the insurer does not object, but is silent until his time for payment has expired, or is about to expire, such delay shall be construed as evidence from which the jury may infer a waiver of the defects. The objection comes too late, because the insurer obtains thereby unfair advantage, which would be obviated by prompt action on his part. If he must object, as we have already held, he should do it promptly, otherwise he would have the advantage of his own wrong in the delay of payment.

This element of delay does not appear in other cases which seem to maintain a contrary doctrine. Thus in *Shawmut Co. v. People's Ins. Co.*, 12 Gray, 539, it is said "the defendant's president far from assuming to waive any of the conditions of the policy, or to accept defective proofs of loss as sufficient, took extraordinary pains

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to give the plaintiffs notice of the defects, and ample opportunity to cure them. Immediately he gave the notice when the first statement was received. Upon receiving additional papers, he informed him they were not full enough, and *a few days* later delivered the papers for correction, calling his attention especially to the want of any statement of the plaintiff's interest. These were peculiar grounds for requiring information on this point." And so he promptly objected. This differs from the present case.

In *Kimball v. Hamilton Ins. Co.*, 8 Bosw. 495, the preliminary proofs were handed in, the president of the company looked over the papers, and told the insured, "these are not proofs, and referred him to his policy for information." The insured was promptly warned of the defects.

In *Peacock v. New York Ins. Co.*, 1 Bosw. 338, the court says: "The defendants are allowed sixty days after the preliminary proofs are furnished, before they can be required to pay. When, therefore, what are in good faith presented to them as preliminary proofs, are in any respect defective, common fairness requires that such defects be suggested, and that it be not held in reserve, to be used afterward to obtain further delay of payment, or to defeat a suit brought for the payment."

That, or something like it, appears in this case. The first proofs were served April 3, 1871; objections were made and further particulars required, May 24, 1871. Fifty-one days had elapsed. Additional proofs were served, June 6, 1871. July 20, 1871, further particulars were required. Forty-four days had elapsed. All the books and proofs in the plaintiff's possession had been submitted to the inspection of the company's adjusting agent before the suit was brought.

The court rightly refused to nonsuit the plaintiff, and permitted these facts to go to the jury as evidence of a waiver of complete preliminary proofs on the part of the plaintiff, at the first service.

It was next urged that there was fraud, or attempts at fraud, by false swearing, or otherwise, which, by the condition of the policies, caused a forfeiture of all claim on the defendants.

The facts relied on to sustain this reason are—

1st. The great discrepancy between the inventory made by the government officers, when they seized the plaintiff's store in November, 1869, and that made by him in April, 1870, when he regained possession.

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2d. The alleged statements made by the plaintiff to Winterton and Colwell soon after the fire, that his stock burned, or his loss amounted to about \$27,000 or \$28,000, whereas his claim shows \$46,510.74.

3d. The affidavit made by the plaintiff, May 23, 1871, which contained the statement that his inventory, dated April, 1870, as included in his proof of loss, was taken by him *without assistance*; whereas it appeared in the evidence that his clerk, Dufford, helped count and gauge, while he made all the entries and estimates, and that it was entered in a book; whereas, it appeared that it was first made on slips of paper.

4th. Further, that there was an error in the account given in the proofs of the amount of sales. This was taken from the books by Edward Pierson, for the plaintiff, and appears to have been his mistake.

5th. Also, that it was not shown that all the goods purchased after March, 1870, went to the store at Morristown, but some to other places, though the entries were on the books.

6th. And in stating that the schedules and account were full, accurate, just and true. All of which, it was alleged were untrue, and showed fraud and false swearing within the condition of the policy, and avoided it.

All the facts and evidence upon which the charges of fraud and false swearing were based, the impeachment of the witnesses by contradiction and untrue statements, and especially of the plaintiff's testimony, were fairly and fully submitted by the judge in his charge to the jury, and I find no misdirection in the charge.

The corrections in the account were made before the suit was brought, and it was competent for the plaintiff to show that they were made by mistake, and restate them. As to the alleged false swearing in the affidavits, and untrue statements of the value of the property destroyed, it is not sufficient to show that there were errors in the fullness and accuracy of the sworn statement of loss, and in the affidavit of a collateral fact, as to who helped in making an appraisement. These may be explained and corrected, if done in good faith. Fraud and false swearing will avoid the policy, but mere mistakes in stating facts, which do not in themselves annul its conditions, and do not appear to be willful misrepresentations, will not defeat the action. *Campbell v. Charter Oak Ins. Co.*, 10

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Allen, 213; *Levy v. Baillie*, 7 Bing. 349; *Briton v. R. Insurance Co.*, 4 Fost. & Fin. 905.

The jury have passed upon all the several matters which were submitted to them by the court, and although there is conflict in the testimony and doubts suggested, yet there is not that clear preponderance of proof against the verdict which would justify the court in disturbing it.

The several exceptions to the ruling of the judge, by which it is said that illegal evidence was admitted and legal evidence ruled out, to the prejudice of the defendants, I will consider briefly.

It was objected that the plaintiff's ledger and cash-book were admitted in evidence. These were the original and only entries of the sales made by the plaintiff from April, 1870, to March, 1871, which were made in the course of his business, and were the originals from which the sales account was taken, which was stated and delivered as a part of the proof of loss, as the correctness of that sales account was in issue, and these books had been called for and examined by the defendants' agents, as part of the plaintiff's preliminary proofs, and were verified by the plaintiff's oath, they were admissible upon that issue. If they were shut out they would exclude all possible testimony of such sales.

The question put to the plaintiff on his cross-examination by the defendant's counsel, as to what debts he owed, and how much he was worth, were not directly relevant to the issue, and were within the discretion of the judge to prevent an undue expansion of the case by collateral facts and issues. Their exclusion is not good cause for setting aside the verdict.

The further question was asked of William H. Camp, a witness for the defendants, who resides in Newark, whether the amount of stock carried by his firm (\$50,000) for their average year's sales (\$500,000), was or was not the prudent proportion of stock to sales in that business.

This question was overruled, and exception taken. The testimony was offered to raise a presumption that the plaintiff's stock, as he claimed, was not in the usual proportion to sales in that business, but much greater, and therefore fraudulent. This question was pressed on the authority of *Insurance Co. v. Weide*, 11 Wall. 438, where it was held that such question, of a merchant in St. Paul, was competent in a suit by another in the same business, in the same city.

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Admitting this to be so, the conditions were alike upon which the presumption was to be based. It was the same kind of business in the same city; but here, a merchant in Newark, a large city, was asked the proportions of his stock and business; and others were to be called for the same purpose, in order to determine the reasonable and probable proportion between the stock and sales of the plaintiff, trading in a small place like Morristown. There was no proper or proximate relation between the two, and the evidence was calculated to mislead the jury. A stock in a large city is turned more rapidly than in a small place, and it is more likely to accumulate in the latter, where the sales are slower, and the business continued for several years. Other differences will suggest themselves, growing out of the peculiarities of men and places. Such testimony does not afford any reasonable inference as to the principal matter in dispute. Nor does it, in the language used in the case above cited, "conduce in any reasonable degree to establish the probability or improbability of the fact in controversy." See, also, 1 Greenl. Ev., § 52, 448; Roscoe's N. P. Ev. 38, 88.

I have thus examined all the material points raised in this case, as the importance of the issue demands, and find no reason to set aside the verdict of the jury.

The motion for a new trial is refused.

SHREVE V. JOYCE.

(33 N. J. [7 Vroom] 44.)

Statute of Limitation — Promise by executor.

A promise by one of two or more executors is sufficient to take a debt of the testator out of the statute of limitations.

SUPREME COURT.—On case certified from Burlington circuit court.

F. Voorhees, for plaintiff.

E. Merritt, for defendants.

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BEDLE, J. The chief question for our solution is, whether a promise by one of two or more executors is sufficient to take a debt of the testator out of the statute of limitations.

Very little can be gathered from the English books on this subject, as the whole matter is controlled by the act of 9 Geo. IV, ch. 14, § 1, known as Lord Tenterden's act, which provides that the promise shall be in writing, and then, that the promise shall only affect the executor making it. Previous to that act, the law had not been sufficiently declared by the English courts to regard it as settled. In *Tullock v. Dunn et al., executors*, Ryan & Moody, 416, Lord Chief Justice ABBOTT (afterward Lord TENTERDEN, and the author of the act referred to) at *nisi prius*, in nonsuiting the plaintiff, remarked, "that the promise by one only is not enough to entitle the plaintiff to recover; there ought to be a promise by both." Afterward, in the case of *McCulloch v. Dawes et al., ex'rs*, 9 D. & R. 385, the same chief justice, sitting in King's Bench, held, under the facts of that case, that there was not sufficient evidence to raise a promise by one executor, but did not question the effect of it upon the other, had it been made. In *Scholey v. Walton*, 12 M. & W. 509 (after the act of 9 Geo. IV), which was an action by the payee of a note against the defendants as surviving executors, it was decided, on the question of an alleged payment by the deceased executor (the act referred to leaving the effect of a payment undisturbed), that what was claimed as a payment was not made in a representative character; but Baron PARKE, in referring to the case of *Tullock v. Dunn*, remarked, that it seemed to him that that case was founded in justice and good sense, and ought to be followed. That, however, was a mere dictum in the cause. ABINGER, C. B., seemed differently inclined, so far as it can be gathered from his opinion. Some little other dicta may be found, but the only direct adjudication upon the subject in the English courts is the case of *Tullock v. Dunn*, and that has only the force of a *nisi prius* decision.

The decisions of other States differ very much. The rule in Massachusetts is, that the promise by one executor will avail against them all. *Emerson v. Thompson*, 16 Mass. 431. In New York, the doctrine appears to be the same, although slightly questioned. *Johnson v. Beardslee*, 15 Johns. 3; *Hammond v. Huntly*, 4 Cow. 494; *Cayuga Co. Bk. v. Bennett*, 5 Hill, 236. In Connecticut, the rule is otherwise. *Peck v. Botsford*, 7 Conn. 172. And so also in

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Pennsylvania. *Fritz v. Thomas*, 1 Whart. 66; *Reynolds v. Hamilton*, 7 Watts, 420; *Forney v. Benedict*, 5 Barr. 225; *Clark v. McGuire, adm'r*, 11 Casey, 259.

The discordant condition of the cases in other States will be seen by reference to the note to *Whitcomb v. Whiting*, 1 Smith's Lead. Cas. 703.

In New Jersey, the question is one of first impression, and we are at liberty to declare the law as we think most in accordance with principle. The power of a single executor or administrator to remove the bar of the statute by a new promise has been seriously questioned, and in some States denied, but I think the law, as understood in this State, both by the profession and as administered at the circuits, and as sustained by the weight of adjudication elsewhere, is that such power exists. All the cases requiring an express promise are based on that assumption. In the case of *Saltar v. Admr. of Saltar*, 1 Halst. 405, the court, after a plea of the statute of limitations to a promise by the intestate in the declaration, gave the plaintiff leave to add a count, stating a promise by the administrator. The opinion of the court was, that "we think the application right, and that it ought to be granted." In *Larason and Hoppock, adm'rs, v. Lambert, adm'r*, 7 Halst. 247, the indications of the opinion of the court are in the same direction, for it seems to have been assumed that the administrator could have taken the case out of the statute, had the acknowledgment or promise been shown to have been made by him after his appointment as administrator, and been otherwise sufficient. There may be many cases where in plain justice the power should exist. An instance is found in the case of *Stark v. Hunton*, 2 Green's Ch. 311, on exceptions to master's report, allowing executors for money paid the Paterson bank for a debt against the testator, not outlawed at the time of his death, but where the claim was delayed on account of statements by the executors that they were not in funds, but when they were, would pay. The executors did not interpose the statute, but paid the demand. Chancellor VROOM remarked in his opinion, that all was done in good faith on both sides, and he could not doubt that the payment was properly made, even though out of the proceeds of land devised, which had been ordered to be sold for the payment of debts. He also stated that "it would be hard equity as against the creditor to say that because he waited at the solicitation and on the promise of the personal

representatives, and did not run either the executors or devisees to expense in collecting a *bona fide* debt actually due, he is now to be met by the statute of limitations, and have his debt taken away."

At the common law, the defendant is bound to plead the statute if he would avail himself of it, and the mere failure of an executor to do it by which a recovery is had, does not in itself make the executor liable to a *devastavit*. 2 Wms. on Ex'rs, 1535.

In Pennsylvania, where an executor may still plead the statute after a new promise, it has been held that he is not bound to plead the statute, because he may know the debt to be a just one, and for that reason the matter is left to his discretion. *Fritz v. Thomas*, 1 Whart. 66. But, as remarked by the editors in the note to *Whitcomb v. Whiting*, 1 Smith's Lead. Cas. 725, "this seems to be a concession of the whole question, for it is difficult to hold either that such a credit can be claimed for the payment of a debt which is not legally valid, or that the executor can give the debt validity in one way and not in another."

Upon a careful review of this question, it must be taken as law in this State that a sole executor (and of course if one, all) has the power by a new promise to remove the bar of the statute. What then will be the effect of a promise by one when there are two or more executors?

The object of the new promise pleaded is not to make the representatives personally liable, but only to reach the estate of the deceased. A co-executor can no more be made personally liable by the new promise of another executor, than in any other matter where the validity of the act of the individual executor in binding the estate may be questioned. The judgment in either case is *de bonis testatoris*, and there could be no personal liability except where the executor has made himself chargeable with a *devastavit*. The result may follow in all cases of undisputed claims against the estate where the executor allows himself to be in fault. I see no good reason based on the risk of personal liability, why one executor should not bind the estate by a new promise. Is there any reason then arising out of the relation of the executors to the estate why it should not be done?

The question is not as to the effect of a mere admission by one executor as exclusive proof of an original debt, but of the effect of a new promise to bar the statute, where the original debt is established and forms the consideration of it.

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Each executor is a representative of the whole estate. Co-executors are regarded in law as an individual person, and by consequence the acts of any one of them in respect of the administration of the effects are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. 2 Wms. on Ex'rs, 810. and notes.

Acts done by any one of them, relating either to the delivery, gift, sale, payment, promise or release of the testator's goods, are the acts of all. Bacon's Abr., Exr's and Adm'rs, D; 2 Starkie's Ev. 82, note. See also cases in note to 2 Wms. on Ex'rs, 810.

The release of a debt by one executor is valid so as to bind the rest, provided of course there is no fraud. The ordinary authority of each executor extends to the testator's whole estate to be administered, and the act of one in that respect is the act of all. That is the general rule, but with exceptions where trusts are to be executed in reference to real estate or other special matters requiring the action of all, and also subject to this, that each is not generally personally liable for the other. The one executor is not the agent of the other so as to bind him personally, but each is the entire representative of the estate to bind that.

The very nature of the office in regard to all the ordinary assets to be administered, and in regard to the ascertainment, adjustment and satisfaction of liabilities, and the power over assets is such as to embrace within its scope as well debts barred by the statute, if in justice they should be paid, as those not barred.

Assuming that the authority exists in all of the executors to relieve from the statute, there is no reason in principle why one is not as competent to exercise it as all. It comes within the general scope of his representative duties, and after examining the cases holding the contrary view, I am satisfied that they are based on arbitrary decision, without any solid reason for making the exception. No argument from the danger of fraud by one executor is tenable, for the co-executor can always set up fraud or collusion in the promise, or dispute the original debt, or show payment. Executors can also plead different pleas if necessary. 2 Wms. on Ex'rs, 1654; *Elwell v. Quash*, 1 Strange, 20.

On these questions, the staleness of the claim would also have its due weight, as well as any other circumstance showing fraud or payment.

An executorship is a matter of personal trust by the testator, and

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there is always some hazard to be run, yet a co-executor can, if so disposed, protect the estate from fraud and imposition. Besides, the courts, on settlement of executor's accounts, where the power of the office has been abused, could make an executor personally account. The result is that one of two or more executors can bind the estate by a new promise.

[The remainder of the opinion relates to the sufficiency of the promise in this case.]

STATE, SANFORD, Relator, v. THE COURT OF COMMON PLEAS OF THE COUNTY OF MORRIS.

(36 N. J. [1 Vroom] 72.)

Constitutional law — local option law.

The Chatham local option law declares the retail of ardent spirits without license to be unlawful, and provides that no license shall be granted if a majority vote of the township is for "no license." *Held*, that the act is constitutional.

That the legislature, under the power to make police regulations, may prohibit the retail of alcoholic stimulants.

That municipal corporations and townships may be invested with authority to regulate or prohibit the retail of intoxicating drinks. (*See note, p. 428.*)

SUPREME COURT. — On application for mandamus.

Pitney, for the motion.

Mills and O. Parker, contra.

VAN SYCKLE, J. This application is made to test the constitutionality of what is termed the Chatham local option law.

The provisions of the act (Laws 1871, p. 1470), are substantially that it should be lawful for the persons qualified to vote at the next annual town meeting, to determine by ballot whether thereafter license to sell spirituous liquors should be granted; that if it should appear that a majority of votes were cast for "no license," it should not thereafter be lawful to grant any such license until otherwise

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decided by a contrary vote at some subsequent town meeting; that from and after the passage of the act, it should not be lawful for any person within said township, without a license for that purpose first had, to sell by less measure than one gallon, and any person so selling without license should be adjudged guilty of a misdemeanor; and lastly, that so much and such parts of all acts and parts of acts as are inconsistent with this act, be and are repealed.

At the time prescribed by the act, a majority of the legal voters of said township voted "no license."

At the following May term of the Morris common pleas, the relator, by petition, signed and verified as by the act "concerning inns and taverns" is required, applied for a license to keep an inn and tavern in Chatham.

The court having refused to entertain said application on the ground that it had no power to grant it, this court is asked to send its writ of mandamus to the court below, in aid of the applicant's petition.

The local option law is alleged to be in conflict with that article of our State constitution which provides, that the legislative power shall be vested in a senate and general assembly.

It must be conceded that this law can have no sanction if it is a delegation of the law-making power to the people of the township.

If the right to declare what the law shall be in one case may be referred to the people, the right to do so may be given in all cases, and thus the legislature may divest itself wholly of the power lodged in it by the fundamental law, until by subsequent legislation it shall be resumed. It is also obvious that it is not competent to delegate to the people the right to say whether an existing law shall be repealed or its operation suspended. To say that what is now the law shall not hereafter, or shall not for a specified time be the law, is in effect to declare the law to be otherwise than it now is, and is a clear exercise of the law-making power. The will of the legislature must be expressed in the form of a law by their own acts. If it is left to the contingency of a popular vote to pronounce whether it shall take effect, it is not the will of the law makers, but the voice of their constituents which molds the rule of action. If the vote is affirmative, it is law; if in the negative, it is not law. The vote makes or defeats the law, and thus the people are permitted unlawfully to resume the right of which they have divested themselves by a written constitution, to declare by

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their own direct action what shall be law. The cases upon this subject, so far as they assert the principles above stated, have my entire concurrence. *Parker v. Commonwealth*, 6 Barr, 507; *Rice v. Foster*, 4 Harr. 479; *Maize v. State*, 4 Ind. 342; *State v. Parker*, 26 Vt. 357; *Santo v. State*, 2 Iowa, 165; *Paterson v. Society, etc.*, 4 Zab. 385.

The test will be whether this enactment, when it passed from the hands of the law-giver, had taken the form of a complete law. It denounces as a misdemeanor the selling of liquor without license; so far it is positive and free from any contingency.

It left to the popular vote to determine, not whether it should be lawful to sell without license, but whether the contingency should arise under which license might be granted.

It was not submitted to the voters of Chatham to say whether there should be a majority vote in favor of license before license could be granted; the law as framed declares that there shall be such majority vote. The operation of the first and second sections of the act "concerning inns and taverns" is not suspended by the declaration of the popular will, but the act itself modifies those sections, and makes it a condition of granting license that there shall be a majority vote.

It is the law which makes the majority vote necessary, and not the voice of the people.

Whether the vote is aye or no, the law at all times is the same, and requires the majority vote as a condition precedent to the granting of license.

If a supplement had been passed requiring instead of twelve reputable freeholders, the signatures of a majority of the legal voters of the township to the applicant's petition, would its constitutionality be challenged?

Upon principle it makes no difference whether the recommendation of the majority is expressed by ballot at a town meeting, or in the form of a certificate.

It is competent for the legislature to prescribe the mode in which it shall be done.

Under the general law, the applicant could not call into exercise the power of the court until twelve freeholders petitioned in a manner therein directed. Under the special act in question an additional restriction is imposed, but it is imposed by the law itself and not by the people.

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If the twelve freeholders under the old law do not certify, the court is restrained from acting; if they do certify, the court can exercise its discretion. So if the majority do not vote for license, the power of the court cannot be invoked; if they do vote for license, it may.

If the twelve freeholders shall not deem it conducive to the public good the privilege is denied, so if the majority shall regard it as inimical to the public welfare to permit the retail trade, the sale must abide under the penalty denounced by the law. The only difference is that under the special act the majority express their judgment as to all applications in gross, while under the general law twelve freeholders act upon them in detail.

The fact that they vote "no license" does not make the law one way, or that they vote "license" the other way.

The vote of the people may be changed, but the rule that a majority vote shall be essential remains unaltered.

The legislature has pronounced what the law shall be, and it cannot be and is not abrogated, changed or altered by the popular expression.

The leading cases of *Rice v. Foster*, and *Parker v. Commonwealth*, are distinguishable in principle from this.

In those cases, the prohibition and penalty were not denounced by the law itself, but by the popular vote. The selling of liquor was not pronounced to be unlawful; it was referred to the people to determine whether it should be restrained.

So in the law proposed to be passed at the last session of our legislature; "the offense defined by the act could not be committed unless the voters of the town determined that licenses should not be granted."

But if this is construed as an act authorizing the township by a majority vote to prohibit the retail traffic in liquors, it may still be supported.

The right of the legislature to grant the power of local government to municipalities is conceded, and it is immaterial whether the enactment conferring it is regarded as a declaration of the supreme legislative will and strictly a law, or merely as a concession of a grant by the legislature, as the representative of the sovereignty of the people.

Such legislation has become so woven into our system of government, and its exercise as an appropriate function of the law-giver

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has passed so long unchallenged, and has been so repeatedly recognized by the courts, that it cannot be permitted now to be called in question.

Under the authority to establish police regulations, municipal corporations may be invested with power to make ordinances to promote the health or contribute to the safety of the community.

Noxious trades may be restrained, the storage of highly inflammable or dangerous materials may be prohibited, disorderly houses may be suppressed, and sports, exhibitions and public performances regulated, restrained or prohibited.

It would not be pretended that authority could be delegated to the corporate body to pronounce how real estate should descend, or personal property be distributed within the city limits.

In almost every city charter, the right to regulate or restrain the sale of intoxicating liquors is expressly conferred, and it could be done only upon the theory that it is a police regulation, and not strictly an exercise of the law-making power.

This species of property is clearly within the same rule, which permits the corporate body under legislative sanction to determine for itself whether gunpowder or nitro-glycerine may be manufactured or stored within its limits.

While alcoholic stimulants are recognized as property and are entitled to the protection of the law, ownership in them is subject to such restraints as are demanded by the highest considerations of public expediency. Such enactments are regarded as police regulations, established for the prevention of pauperism and crime, for the abatement of nuisances, and the promotion of public health and safety. They are a just restraint of an injurious use of property, which the legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom where it is not controlled by fundamental law.

It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition "that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community."

Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the

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range and scope of legislative action to declare what general regulations shall be deemed expedient.

If, therefore, the legislature shall consider the retail of ardent spirits injurious to citizens, or productive of idleness and vice, it may provide for its total suppression. Such inhibition is justified only as a police regulation, and its legality has been recognized in well-considered cases.

It is neither in conflict with the power of congress over subjects within its exclusive jurisdiction, nor with any provisions of our State constitution, nor with general fundamental principles. Cooley on Const. Limitations, p. 583, and cases there referred to; *Thurlow v. Massachusetts*, 5 How. 504.

It is not necessary to amplify discussion on this point, or to criticise the cases in detail. The view here taken underlies the whole subject of police regulations, and cannot logically be narrowed in its application.

An examination of the cases will show that some laws of this character have failed to receive the approval of the courts, because they invaded the right of the citizen to be secure against unreasonable searches, or denied to him a fair trial before condemnation of his property.

It necessarily results that municipal corporations may derive the power to interdict the sale of intoxicating drinks from the same source to which they owe their authority to regulate it. The grant of power to prohibit the sale is no more the delegation of a right to make law than the grant of authority to regulate it.

Assuming this proposition, how may such authority be exercised by the corporate body?

Obviously, the only limitation must be contained in the terms of the grant itself, in the absence of any constitutional restraint. It is wholly immaterial how the power is exercised, so long as it is in the mode appointed by the superior. In establishing the local government, the power may, at the discretion of the legislature, be lodged in the people to make rules for the regulation of their internal police by their direct vote in mass meeting assembled, or through designated officials by themselves duly elected. It would, therefore, be within the province of the legislature to confer upon a city the right, by a majority vote of its inhabitants, to pass ordinances for the regulation or suppression of the retail trade in ardent spirits.

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This leads to the question whether Chatham township was in a position to receive such a measure of the power of local government?

The inhabitants of the several townships in this State are incorporated by a general law. They have, therefore, without question, exercised many powers through a direct vote of the people. They determine how the poor shall be kept, how much money shall be raised for roads, and how much, if any, for school purposes, and I know of no reason why they may not be vested with the same powers which are or could be granted to municipal corporations, including the one which has given rise to this contest.

Whether these laws are wisely framed to subserve their purpose is not to be determined by the court, but must be referred to that branch of our government which has the exclusive right to enact or repeal them.

Regarding the established rule, that only in clear cases of excess should the action of the legislature be arrested by judicial interference, I am of opinion that the mandatory writ should be denied.

NOTE.— See *State v. Weir*, 11 Am. Rep. 115 (35 Iowa, 124), wherein the Supreme Court of Iowa held a "local option law" unconstitutional. The same doctrine was also held in *Ex parte Wall*, 10 Alb. Law J. 284, by the Supreme Court of California, wherein the question was quite fully discussed. In *Commonwealth v. Bennett*, 108 Mass. 27, it was held that the legislature may authorize a town to determine by a vote of the inhabitants, or a city, by a vote of the city council, whether the sale of particular kinds of liquors within its limits shall be permitted or prohibited. The court said:

"Many successive statutes of the Commonwealth have made the lawfulness of sales of intoxicating liquors to depend upon licenses from the selectmen of towns or commissioners of counties, and such statutes have been held to be constitutional. 7 Dane's Ab. 43, 44; *Commonwealth v. Blakington*, 24 Pick. 852. It is equally within the power of the legislature to authorize a town by vote of the inhabitants, or a city by vote of the city council, to determine whether the sale of particular kinds of liquors within its limits shall be permitted or prohibited. This subject, although not embraced within the ordinary power to make by-laws and ordinances, falls within the class of police regulations, which may be intrusted by the legislature by express enactment to municipal authority. *Commonwealth v. Turner*, 1 Cush. 498, 495; *State v. Noyes* 10 Fost. 279; *Bancroft v. Dumas*, 21 Verm. 456; *Tanner v. Trustees of Albion*, 5 Hill, 121; *State v. Simonds*, 3 Mo. 414."

This decision was approved and re-affirmed by the same court in *Commonwealth v. Dean*, 110 Mass. 267. See *Locke's Appeal*, post. — RER.

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OTTERSON V. HOFFORD.

(33 N. J. [7 Vroom] 139.)

Evidence to contradict affidavit of subscribing witness to will.

The record of a will, together with the affidavit of the subscribing witnesses made at the time of probate, being offered in evidence; *held*, competent for the opposing party to show statements made out of court by one of the subscribing witnesses, in order to contradict the statements of such affidavit as to the due execution of the will.

. ON rule to show cause why a new trial should not be granted.

J. G. Shipman, for plaintiff.

P. L. Voorhees and *Browning*, for defendant.

BRASLEY, C. J. This is an action of ejectment, both parties claiming title under the same ancestor; the plaintiff in right of his wife as heir at law, the defendant by force of a will.

After the plaintiff had proved the pedigree on which he relied, the defendant introduced a certified copy of the record of the will in question. Upon an inspection of this copy, it appears that there were three testamentary witnesses, all of whom had been sworn in making probate. One of these witnesses was produced at the trial by the plaintiff, and testified to the effect that the will had not been legally executed. Another of them being called by the defendant controverted the statements of the former, and made out a legal execution of the instrument. The third subscribing witness was not called on either side.

In this condition of the case the plaintiff's counsel offered to show that the third witness, who had not been sworn, had made sundry statements inconsistent with the fact of the due execution of the will in his presence. This offer having been overruled by the court, constitutes one of the grounds on which a new trial is asked.

To fully estimate the force of the plaintiff's position, the exact situation of the parties with respect to the evidence before the court at the time of this offer, is to be kept clearly in view. The defendant was standing before the jury, in part, on the affidavit of

this absent witness. That testimony, if accepted as true, proved the point in dispute, which was, whether the will had been executed according to the statute. The defendant did not call the witness, out relied on his *ex parte* affidavit, as it appeared on the record made up by the surrogate in compliance with the act. The plaintiff therefore had no opportunity to cross-examine this witness, whose testimony was so important. If he had been called by the plaintiff himself and had confirmed his affidavit, his statements inconsistent with his recorded oath, could not have been shown. The plaintiff would not have been permitted to break down his own witness. The question is, whether by the operation of the statute which directs the surrogates to record wills, "together with the proofs thereof," and which declares that certified transcripts of such records shall be received in evidence, the party against whom such transcript may be offered is deprived not only of the opportunity of cross-examination, but also of the right to show statements made by the testamentary witnesses at variance with their oaths at the time of probate.

To the extent of the legal principle involved in this inquiry, the decisions heretofore made by this court appear to be conclusive on this point. To this class belongs the judgment in the case of *The Reformed Dutch Church v. Ten Eyck*, 1 Dutch. 40. One of the objections to the proceedings in that instance was, that the written statements of a subscribing witness to a deed, who was dead, in disparagement of the evidence afforded by his signature, had been admitted, but such objection was not allowed to prevail. "It would seem," says the opinion of Chief Justice GREEN, "from the necessity of the case, and as affording the best substitute for the opportunity of cross-examination, which has been lost by the death of the witness, the evidence ought to be received in support of a charge of fraud or forgery. But standing alone, unsupported by other evidence, it is entitled to but little weight, and should never be suffered to defeat the title." This point passed again under consideration in the case of *Boylan ads. Meeker*, 4 Dutch. 294, and the same view was taken with respect to it. The principle adopted is thus expressed. It is from the opinion of Chief Justice WHELPLEY that I quote: "Chief Justice EWING, in the course of an elaborate judgment in *Patterson v. Tucker*, holds that the foundation of the rule permitting proof of the handwriting of the subscribing witnesses to stand as proof of the execu-

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tion of the instrument in certain cases is, that the attestation of the witness is a declaration by him that the instrument was duly executed in his presence, as the attestation clause usually declares. If that be the case, I think it is quite clear whenever the attestation is offered in evidence as proof of the execution of the instrument, any evidence which would have been competent against the witness, had he been sworn, will be competent to overthrow the force of his declaration offered in evidence instead of his testimony." The case of *Loses v. Losee*, 2 Hill, 609, stands on the same ground, it being there held that where the plaintiff relied on the proof of the handwriting of a deceased subscribing witness, the defendant might give evidence of his bad character for the purpose of rebutting the presumption that the instrument, to which his name was attached, had been duly executed. The doctrine embodied in these decisions applies, *a fortiori*, to the present case. If the accident of the death of the subscribing witness will not take away the right of the opposing party to prove the bad character of such witness, or statements made by him inconsistent with the influences necessarily arising from his signature, much less will such incapacity arise from the failure of the party claiming under the instrument in dispute, to call such witness to the stand. The decisions which have denied the right to impeach, by the modes in question, the testimony of the subscribing witness, were so decided on the ground that the proof of the signature of the witness did not import an attestation on his part that the instrument had been duly executed in his presence. This was the reasoning in *Stobart v. Dryden*, 1 M. & W. 615, a case the authority of which was rejected in the determinations of this court already referred to. But even this repudiated ground of judgment is not applicable in the present instance. It was the affidavit and not mere proof of the signature of the witness, which was on this occasion before the jury, so that there is no question as to the meaning or effect of the evidence. The witness had testified, as appeared on the record, that the will had been legally executed, and the facts making out such legality had been stated by him. The defendant, instead of calling the witness, relied on this affidavit. By such a course can he deprive his adversary of all chance of showing the unreliability of such witness from his own mouth? Such an option would be greatly inexpedient, and tend to manifest unfairness. Suppose the case of a will fraudulently obtained, the witness being privy to the fraud. As a copy of

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the record of the will can be introduced, and thus the examination of the witnesses dispensed with, it seems one of the necessities of the case, in the pursuit of a just result, to admit evidence of variant statements made out of court by such witnesses, or as to their general bad character for truth. Such testimony, standing alone, would not invalidate the instrument, but, when supported by other proofs, ought to be received as a compensation for the loss of the privilege of cross-examination, and in order to impair in some measure the effect of proof of the signature in connection with the clause of attestation. The statute, making copies of the records of wills evidence, was not designed to give to persons claiming under such instruments any undue advantage when a question was mooted as to their honest or legal execution. The intention was to make them *prima facie* evidence for the sake of convenience. But when such record is produced, the ordinary principles of evidence become applicable, one of which is, that the statements of the subscribing witness made out of court which do not coincide with his affidavit at the time of probate, or with the import of the attestation clause, may be introduced by way of contradiction.

The evidence in question, I think, ought to have been admitted.

The other objection to the proceedings has been examined, but appears to me so manifestly fallacious that I have not thought it necessary to discuss it.

On the ground first specified, a new trial should be granted.

New trial granted.

SLOCUM V. SEYMOUR.

(33 N. J. [7 Vroom] 123.)

Statute of Fraud — Sale of standing timber.

A sale of standing timber, by the owner of the freehold, is not a sale of a chattel interest, but of an interest in lands, and is not controlled by the doctrine of warranty of title in sales of personal property.

In no sense can trees, the natural and permanent growth of the soil, be regarded as partaking of the character of emblements or *fructus industriales*, but are a part of the inheritance, and can only become personalty by actual severance, or by a severance in contemplation of law, as the effect of a proper instrument of writing.

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When a contract comprehends an interest in trees standing, with a right in the vendee to sever them, the subject-matter is then an interest in land within the statute of frauds.

ERROR to the circuit court of the county of Bergen.

O. H. Voorhis, for plaintiff in error.

H. A. S. Man, for defendant.

BEDLE, J. Slocum conveyed to Seymour by an ordinary deed of conveyance, dated December 20, 1860, all the wood and timber upon a certain tract of land, with the right, in the vendee, to cut and remove the same before July 1, 1862. The deed described the tract by metes and bounds, and as the same premises conveyed to Slocum by Abram W. Haring and wife, by deed of even date with the deed to Seymour. The title of Slocum to a part of the tract proved defective, and this suit is brought upon an alleged implied covenant of title in the plaintiff's (Seymour's) deed. There is no express covenant of title, but there is a covenant against the acts of the grantor. The charge was based upon the assumption that the parties had treated this as a sale of personal property, and that a warranty of title would be implied by the law. Although there is great diversity in the cases, whether a sale of standing timber by the owner of the freehold is of a chattel interest, I am satisfied that such a sale is of an interest in lands, and not controlled by the doctrine of warranty of title in sales of personal property. In no sense can trees, the natural and permanent growth of the soil, be regarded as partaking of the character of emblements, or *fructus industriales*, but are a part of the inheritance, and can only become personalty by actual severance, or by a severance in contemplation of law as the effect of a proper instrument writing. It may be conceded, and such is the law, as in the case of *Smith v. Surman*, 9 B. & C. 561, that there may be a valid parol contract for the sale of timber as a chattel where it is to be cut and delivered by the vendor, although designated as being upon certain land, and where the contract contemplates no property to the vendee in the trees until after they are actually cut down and reduced to chattels; yet, where the sale is of an interest in the trees standing, without having been in legal effect severed by the force of a previous written instrument, and although the American

cases differ upon the subject, the best considered of them, and those which I think declare the law, hold that such a sale is of an interest in lands, within the meaning of the statute of fraud. *Green v. Armstrong*, 1 Den. 551; *Buck v. Pickwell*, 27 Vt. 158; *Putney v. Day*, 6 N. H. 430; *Olmstead v. Niles*, 7 id. 522.

This also is a fair result of the English cases, although to some extent conflicting. The duly adverse ruling in point in England is in 1 Lord Raymond, 182, where it is stated that TREBY, C. J., reported to the other justices that on a question before him at *nisi prius*, whether the sale of timber growing ought to be in writing by the statute of frauds, or might be by parol; he was of opinion, and ruled accordingly, that it might be by parol, because it was a bare chattel. The report also states, and POWELL, J., agreed to this opinion, but whether informally or in banc, it is difficult to tell from the report. This ruling is also mentioned in Buller's *Nisi Prius*, 282, as per TREBY, C. J. But the case of *Scorell v. Boxall*, 1 Younge & Jervis, 395, is directly to the contrary, and in it HULLOCK, B., regards the report in Lord Raymond as a dictum merely and not as an authority. That report is undoubtedly the foundation of all the American cases to the same effect, but it is not considered as the settled law in England. The case of *Scorell v. Boxall* was this: The plaintiff had purchased, by parol, underwood standing, to be cut by him, and brought his action against the defendants for cutting and carrying it away. The court of exchequer held that the plaintiff's contract was a mere parol contract for the sale of growing underwood, a part of the freehold, and in direct violation of the statute of frauds—that it was the sale of an interest in land. See also the case of *Teal v. Auty*, 2 B. & B. 99, to the same effect as to the purchase of growing poles.

As already indicated, trees may become personalty when actually severed, or when the property in claim has become distinct from the freehold by written transfer. There may also be valid parol contracts with the owner of the soil, with reference to their sale and delivery as chattels in contemplation of severance, where no interest in the trees standing is intended by the bargain, the same as contracts for the sale of lumber to be cut, sawed and delivered as such; but when the contract comprehends an interest in the trees standing, with a right in the vendee to sever them, the subject-matter is then an interest in land within the statute of frauds.

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Such was clearly the character of the contract between these parties, as the deed shows an intention to convey, and does convey, an interest in the wood and timber standing, when a part of the freehold, in the hands of the vendor. The deed secures to Seymour an actual property in the trees as a part of the land, and not merely a right of action under a contract of purchase of personal property.

The bargain having been consummated in this case by the delivery and acceptance of a deed of conveyance, the doctrine of *caveat emptor* must apply in the absence of fraud, unless the purchaser has protected himself by a covenant of warranty of title in the deed. *Phillips v. City of Hoboken*, 2 Vroom, 143 ; 4 Kent, 471 (note).

In this deed there is no such covenant, and the law will not imply one. For these reasons the action was not maintainable, and the judgment must be reversed.

Judgment reversed.

BENNETT V. NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.

(23 N. J. [7 Vroom] 225.)

Master and servant—Negligence.

The driver of a horse car is not the agent of a passenger so as to render such passenger chargeable with the negligence of such driver.

Where a passenger in a horse car is injured by the carelessness of the engineer of a railroad company in the management of his locomotive, it is no defense to show contributory negligence in the driver of the horse car.

ON rule to show cause, etc.

Leon Abbett, for plaintiff.

I. W. Soudder, for defendants.

BRASLEY, C. J. The cars of the Jersey City and Bergen Railroad Company, in crossing the track of the defendants, the

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New Jersey Railroad and Transportation Company, were struck by the locomotive of the latter company. At the time of this occurrence the plaintiff was a passenger in the horse car, and was considerably injured by the collision. The jury found the servants of the defendants in fault, and gave the plaintiff \$5,000 damages. The case stands before this court on a motion for a new trial, founded on two grounds: first, for a misdirection in matter of law at the circuit; and, second, because the damages are excessive.

The question of law then presented is this: the defendants at the trial contended that there was evidence tending to show negligence in the servants of the horse car company, which negligence was, in part, productive of the accident, and requested the judge who presided to charge the jury that if this was so, the plaintiff was not entitled to recover. The proposition claimed to be law is, that when a passenger enters a public conveyance, he, in some sort, becomes affected by the negligence of the agents of those in charge of such conveyance, at least to the extent of debarring him from suits against third parties for injuries occasioned by the joint carelessness of such third parties, and that of the servants having the control of the vehicle in which he is riding.

This position has for its support the case of *Thorogood v. Bryan*, 8 Man., Gr. & Scott, 116. The authority is in every respect in point. The suit was by the representatives of a person who had been run over and killed. The deceased was a passenger in an omnibus, and in getting out had been run over by the omnibus of the defendant. The judge trying the cause charged the jury that if any want of care on the part of the driver of the omnibus in which the deceased was a traveler, had been conducive to the injury, their verdict must be for the defendant. This ruling was approved of by the court in banc.

The case stands, I think, in point of principle, alone in the line of English decisions, and the grounds upon which it rests seem to me inconsistent with familiar rules. The reason given for the judgment is, that the passenger in the omnibus "must be considered as identified with the driver of the omnibus in which he voluntarily" becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could only result in one way, that is, by considering

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such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver, or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so on the same ground each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. And yet it is to be presumed that no court would go this length and impose on each person being carried by a railroad train, responsibility for the misconduct of the engineer or conductor of such train. The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger, for the single purpose of preventing the passenger from bringing suit against a third party, whose negligence has co-operated with that of the driver in the production of the injury. I am compelled to dissent to such a proposition. Under the circumstances in question, the passenger is a perfectly innocent party, having no control over either of the wrong-doers, and I see no reason why, according to the usual rule, an action will not lie in his behalf against either or both of the employers of such wrong-doers.

Nor do I think that in the English courts it is considered that the case of *Thorogood v. Bryan* has settled the rule of law.

The question involved in it was decided on a rule to show cause, a circumstance which was regretted by one of the judges, who said that the subject was an important one, and ought to be definitively set at rest. The case itself was disparagingly criticised in the 4th edition of Smith's Lead Cas., Vol. I, page 220; and this criticism

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has, on two occasions at least, been referred to by the English courts, with marked respect. *Tuff v. Warman*, 2 C. B. (N. S.) 750; *Waite v. North Eastern R. Co.*, El., B. & El. 728. From these considerations this case does not bear the weight which a deliberate decision of the court of the King's Bench ordinarily carries with it. The doctrine of the case has, however, been adopted in Pennsylvania (*Lockhart v. Lichtenthaler*, 46 Penn. 152), but has been repudiated in New York. *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Webster v. Hudson R. R. Co.*, 38 id. 260.

The result is that in the present case the jury was rightly instructed that the carelessness of the driver of the street car in which the plaintiff was a passenger could not affect the suit or bar the plaintiff's right to recover for the negligence of the defendant.

Rule discharged.

WOLCOTT v. MOUNT.

(36 N. J. [7 Vroom] 262.)

Sale—representations as to vegetable seeds—implied warranty—Measure of damages.

M., a market gardener, applied to W. & Co., merchants, who kept agricultural seeds for sale, for "early strap-leaved red-top turnip seed." W. showed him the seed which he said was that kind, and sold it to him as such. M. informed W., at the time of the purchase, that he wanted that kind of seed to raise a crop for the early market. M. sowed the seed, and it turned out to have been another kind of turnip seed, of an inferior quality. The representation was made in good faith, W. & Co. having purchased the seed as early strap-leaved red-top turnip seed. In an action for breach of warranty—*Held on certiorari*, (1) that the question whether the statements were merely an expression of opinion or a warranty, was one of fact in the court below, and the evidence tending to show that a warranty was made, the finding could not be reviewed; (2) that the measure of damages was the difference between the market value of the crop raised and the same crop from the seed ordered.

A statement in a contract sale, descriptive of the thing sold, if intended to be part of the contract, is a condition, on the failure of which the purchaser may repudiate, or, if a rescission has become impossible, it may be treated as a warranty, for the breach of which damages may be recovered.

It is a question of fact, to be determined from all the circumstances of the case, whether a representation, descriptive of the articles sold by a name by which it is known in the market, is an expression of judgment or opinion only, or was intended as a warranty.

Loss of profits may be recovered as damages for the non-performance of a con-

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tract, if the loss results directly from the breach of the contract itself, or is such as might reasonably be supposed to have been in the contemplation of both parties at the time of the making of the contract, as the result of non-performance; provided that the profits to be compensated for are such as are capable of being ascertained by the rules of evidence, to a reasonable degree of certainty. (*See note, p. 447.*)

SUPREME COURT.—On *certiorari* to the Monmouth Pleas, on the trial of an appeal from the judgment of a justice of the peace.

The cause was argued in this court on the following statement of the case:

On the trial of the appeal, Mount, the appellee and plaintiff before the justice, proved that Wolcott, Johnson & Co. were merchants, keeping a store of general merchandise, in the county of Monmouth, and that, among other articles, they advertised and kept agricultural seeds for sale, and sold seeds. Mount went to their store and asked one of the partners, Bloomfield Wolcott, for early strap-leaf red-top turnip seed, and Wolcott showed him, and sold to him, seed which Wolcott told him was early strap-leaf red-top turnip seed, and sold it to Mount (two pounds) as such, and Mount paid him _____ cents for the same. Mount sowed the same on _____ acres of his ground, which he had prepared with care and great expense for the purpose. Mount had been in the habit, year after year, to sow early strap-leaf red-top turnip seed, to produce turnips for the early New York market, such kind and description of turnips yielding a large profit, and he, at time of purchase, stated that he wished this description and kind of seed for that purpose.

The seed sold to Mount by Wolcott was sown upon the ground prepared for same by Mount, and the turnips produced therefrom were not early strap-leaf red-top turnips, but turnips of a different kind and description, to wit, Russia, late, and not salable in market, and only fit for cattle, and he lost his entire crop. The plaintiff proved that the seed sold him by Wolcott was not early strap-leaf red-top turnip seed, but seed of a different kind and description, to wit, Russia turnip seed, and that it produced no profit to him, and that early strap-leaf red-top turnip seed on same ground in other years had produced large profits to Mount, and on adjoining ground, prepared in same way, the same year, had produced great profits to the owner, and that Mount was damaged thereby.

It is agreed that Wolcott did not know that the seed he sold Mount was not early strap-leaf red-top turnip seed, and that he did

not sell the seed to him fraudulently, the said Wolcott having purchased the seed for early strap-leaf red-top turnip seed. It is also agreed that this kind of turnip seed cannot be known and distinguished, by the examination through sight or touch, from Russia or other kinds, but only by the kind of turnips it produces after sowing, can it be known.

The court of common pleas gave judgment for the plaintiff below for \$99.12 damages.

H. G. Clayton, for plaintiff in *certiorari*.

B. Gummere, for defendant.

DEPUE, J. The action in this case was brought on a contract of warranty and resulted in a judgment against the defendants in the action for damages.

Two exceptions to the proceedings are presented by the brief submitted. The first touches the right of the plaintiff to recover at all. The second the measure of damages.

In the absence of fraud or a warranty of the quality of an article, the maxim, *caveat emptor*, applies. As a general rule, no warranty of the goodness of an article will be implied on a contract of sale.

It has been held by the courts of New York, that no warranty whatever would arise from a description of the article sold. *Seixas v. Woods*, 2 Caines, 48; *Snell v. Mosses*, 1 Johns. 96; *Sweet v. Colgate*, 20 id. 196. In these cases the defect was not in the quality, but the article delivered was not of the species described in the contract of sale.

In the well-known case of *Chandelor v. Lopus*, Oro. Jac. 4, it was decided that a bare affirmation that a stone sold was a bezoar stone, when it was not, was no cause of action.

The cases cited fairly present the negative of the proposition on which the plaintiff's right of action depends. *Chandelor v. Lopus* was decided on the distinction between actions on the case *in tort* for a misrepresentation, in which a scienter must be averred and proved and actions upon the contract of warranty. 1 Smith's Lead. Cas. 283. Chancellor KENT, who delivered the opinion in *Seixas v. Woods*, in his Commentaries expresses a doubt whether the maxim, *caveat emptor*, was correctly applied in that case, inasmuch as there was a description in writing of the article sold, from which a warranty might have been inferred. 2 Kent, 479. And

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in a recent case before the commission of appeals of New York, **EARL, C.**, declared that *Seizas v. Woods* had been much questioned and could no longer be regarded as authority on the precise point. *Hawkins v. Pemberton*, 51 N. Y. 204. In the later English cases some criticism has been made upon the application of the term "warranty" to representations in contracts of sale, descriptive of articles which are known in the market by such description, per Lord **ABINGER** in *Chanter v. Hopkins*, 4 M. & W. 404; per **ERLE, C. J.**, in *Bannerman v. White*, 10 C. B. (N. S.) 844. But in a number of instances it has been held that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate in toto, by a refusal to accept or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission therefor has become impossible, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages. The rule of law is thus stated by **WILLIAMS, J.**, in *Behn v. Burness*, as established on principle and sustained by authority, 3 B. & S. 755.

In *Bridge v. Wain*, 1 Starkie, 504, no special warranty was proved, but the goods were described as scarlet cuttings, an article known in the market as peculiar to the China trade. In an action for breach of warranty, Lord **ELLENBOROUGH** held that if the goods were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred. In *Allan v. Lake*, 18 Q. B. 560, the defendant sold to the plaintiff a crop of turnips, described in the sold note as Skirving's Sweedes. The seed having been sown, it turned out that the greater part was not of that kind, but of an inferior kind. It was held that the statement that the seeds were Skirving's Sweedes was a description of a known article of trade and a warranty. In *Josling v. Kingsford*, 13 C. B. (N. S.) 447, the purchaser recovered damages upon a contract for the sale of oxalic acid, where the jury found that the article delivered did not, in a commercial sense, come properly within the description of oxalid acid, though the vendor was not the manufacturer, and the vendee had an opportunity of inspection (the defect not being discoverable by inspection), and no fraud was suggested. In *Wieler v. Schilliari*, 17 C. B. 619, the sale was of "Calcutta linseed." The goods had been delivered, and the

action was in form on the warranty implied from the description. The jury having found that the article delivered had lost its distinctive character as Calcutta linseed, by reason of the admixture of a foreign substance, the plaintiff recovered his damages upon the warranty.

The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, is also sustained by the following English cases: *Powell v. Horton*, 2 Bing. N. S. 668; *Barr v. Gibson*, 3 M. & W. 390; *Chanter v. Hopkins*, 4 id. 399; *Nichol v. Godts*, 10 Exch. 191; *Gompertz v. Bartlett*, 2 E. & B. 849; *Azemar v. Casella*, Law Rep., 2 C. P. 431, 677; and has been approved by some decisions in the courts of this country. *Henshaw v. Robins*, 9 Metc. 83; *Borrekins v. Bevan*, 3 Rawle, 23; *Osgood v. Lewis*, 2 Harr. & Gill, 495; *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595.

The right to repudiate the purchase for the non-conformity of the article delivered to the description under which it was sold is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason, supported by principle, can be adduced why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial.

The contract which arises from the description of an article on a sale by a dealer not being the manufacturer, is not in all respects co-extensive with that which is sometimes implied, where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection, in which case, a warranty, under some circumstances, is implied that the goods shall be merchantable, or reasonably fit

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for the purpose for which they were ordered. In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified. If the article corresponds with that description, no warranty is implied that it shall answer the particular purpose in view of which the purchase was made. *Chanter v. Hopkins*, 4 M. & W. 414; *Ollivant v. Bayley*, 5 Q. B. 288; *Windsor v. Lombard*, 18 Peck. 55; *Mixer v. Coburn*, 11 Metc. 559; *Gossler v. Eagle, etc., Co.*, 103 Mass. 331. The cases on this subject, so productive of judicial discussion, are classified by Justice MELLOR, in *Jones v. Just*, Law Rep., 3 Q. B. 197. Nor can any distinction be maintained between statements of this character in written and in oral contracts. The arguments founded on an apprehension that where the contract is oral, loose expressions of judgment or opinion pending the negotiations might be regarded as embodied in the contract, contrary to the intentions of parties, is without reasonable foundation. It is always a question of construction or of fact, whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract when concluded. If the contract is in writing, the question is one of construction for the court. *Behn v. Burmiss*, 3 B. & S. 751. If it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller. *Lomi v. Tucker*, 4 C. & P. 15; *De Sewhanberg v. Buchanan*, 5 id. 343; *Power v. Barham*, 4 A. & E. 473. In the case last cited, the vendor sold by a bill of parcel, "four pictures, views in Venice—Canaletto;" it was held that it was for the jury to say, under all circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion, and that the bill of parcels was properly laid before the jury with the rest of the evidence.

The purchaser may contract for a specific article, as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York

market. The defendants showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. The inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence, it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on *certiorari*, review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred.

The second reason for reversal is, that the court was in error in the damages awarded. The judgment was for consequential damages.

The contention of the defendants' counsel was, that the damages recoverable should have been limited to the price paid for the seed, and that all damages beyond a restitution of the consideration were too speculative and remote to come within the rules for measuring damages. As the market price of the seed which the plaintiff got, and had the benefit of in a crop, though of an inferior quality, was probably the same as the market price of the seed ordered, the defendants' rule of damages would leave the plaintiff remediless.

The earlier cases, both in English and American courts, generally concurred in excluding, as well in actions in tort as in actions on contracts, from the damages recoverable, profits which might have been realized if the injury had not been done, or the contract had been performed. Sedg. on Dam. 69.

This abridgment of the power of courts to award compensation adequate to the injury suffered has been removed in actions of tort. The wrong-doer must answer in damages for those results injurious to other parties, which are presumed to have been within his contemplation when the wrong was done. *Benninger v. Crater*, 4 Vroom, 513. Thus, in an action to recover damages for personal injuries caused by the negligence of the defendant, the plaintiff was held to be entitled to recover as damages the loss he sustained in his profession as an architect, by reason of his being incapacitated from pursuing his business. *New Jersey Express Co. v. Nichols*, 4 Vroom, 435.

A similar relaxation of this restrictive rule has been made at least to a qualified extent, in action on contracts, and loss of profits resulting naturally from the breach of the contract has been allowed

to enter into the damages recoverable where the profits that might have been realized from the performance of the contract are capable of being estimated with a reasonable degree of certainty. In an action on a warranty of goods adapted to the China market, and purchased with a view to that trade, the purchaser was allowed damages with reference to their value in China, as representing the benefit he would have received from the contract, if the defendant had performed it. *Bridge v. Wain*, 1 Starkie, 504. On an executory contract put an end to by the refusal of the one party to complete it, for such breach the other party may recover such profits as would have accrued to him as the direct and immediate result of the performance of the contract. *Fox v. Harding*, 7 Cush. 516; *Masterton v. Mayor of Brooklyn* 7 Hill, 61. In an action against the charterer of a vessel for not loading a cargo, the freight she would have earned under the charter-party, less expenses and the freight actually received for services during the period over which the charter extended, was held to be the proper measure of damages. *Smith v. McGuire*, 3 H. & N. 554.

In the cases of the class from which these citations have been made, and they are quite numerous, the damages arising from loss of profits were such as resulted directly from non-performance, and in the ordinary course of business, would be expected as a necessary consequence of the breach of the contract. In the two cases cited of *Fox v. Harding*, and *Masterton v. Mayor of Brooklyn*, it was said that the profits that might have been realized from independent and collateral engagements, entered into on the faith of the principal contract, were too remote to be taken into consideration. This latter qualification would exclude compensation for the loss of the profits of a resale by the vendee of the goods purchased, made upon the faith of his expectation, that his contract with his vendor would be performed.

In the much canvassed case of *Hadley v. Baxendale*, 9 Exch. 341, ALDERSON, B., in pronouncing the judgment of the court, enunciated certain principles on which damages should be awarded for breaches of contracts which assimilated damages in actions on contract to actions *in tort*. The rule there adopted as resting on the foundation of correct legal principles was, that the damages recoverable for a breach of contract were either such as might be considered as arising naturally, *i. e.*, according to the usual course of things, from the breach of the contract itself; or such as might reasonably be supposed to have

been in the contemplation of both parties at the time they made the contract, as the probable results of the breach of it; and that when the contract was made under special circumstances, if those special circumstances are communicated, the amount of injury which would ordinarily follow from a breach of the contract, under such circumstances, may be recovered as damages that would reasonably be expected to result from such breach. The latter branch of this rule was considered by BLACKBURN, J., and MARTIN, B., as analogous to an agreement to bear the loss resulting from the exceptional state of things, made part of the principal contract, by the fact that such special circumstances were communicated, with reference to which the parties may be said to have contracted. *Horne v. The Midland Railway Company*, Law Rep., 8 C. P. 134-140. Under the operation of this rule, damages arising from the loss of a profitable sale, or the deprivation for a contemplated use, have been allowed when special circumstances of such sale or proposed use were communicated contemporaneously with the making of the contract; and have been denied when such communication was not made so specially, as that the other party was made aware of the consequences that would follow from his non-performance. *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; *Cory v. Thomas Ironworks Co.*, Law Rep., 3 Q. B. 181; *Horne v. The Midland Railway Co.*, L. R., 8 C. P. 134; Benjamin on Sales, 665-671.

It must not be supposed that under the principle of *Hadley v. Baxendale* mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.

For instance, profits expected to be made from a whaling voyage, the gains from which depend in a great measure on chance, are too purely conjectural to be capable of entering into compensation for

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the non-performance of a contract, by reason of which the adventure was defeated. For a similar reason, the loss of the value of a crop for which the seed had not been sown, the yield from which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation, with that degree of certainty which the law exacts in proof of damages. But if the vessel is under charter, or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sown on the ground prepared for cultivation, and the plaintiff's complaint is, that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimation of the injury resulting from the loss of profits of this character.

In this case the defendants had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes, to a purchaser engaged in that business, would of itself imply knowledge of the use which was intended, sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent upon the condition of weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed. The difference between the market value of the crop raised, and the same crop from the seed ordered, would be the correct criterion of the extent of the loss. Compensation on that basis may be recovered in damages for the injury sustained as the natural consequence of the breach of the contract. *Randall v. Raper*, E. B. & E. 84; *Lovegrove v. Fisher*, 2 F. & F. 128.

From the state of the case, it must be presumed that the court below adopted this rule as the measure of damages, and the judgment should be affirmed.

Order affirmed.

Justices BEDLE and DALRIMPLE concurred.

NOTE. — In *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595, the earlier cases of *Setras v. Woods*, 2 Cal. 48, and *Sweet v. Colgate*, 20 Johns. 196, were departed from and expressly disapproved. In *Pastinger v. Thorburn*, 84 N. Y. 684, where the defendant sold cabbage seed and warranted the same to produce Bristol cabbages, which warranty was untrue, held, the damages would be the value of a crop of Bristol cabbages, such as ordinarily would have been produced that year, deducting the expense of raising the crop and also the value of the crop actually raised therefrom. — REP.

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(36 N. J. [7 Vroom] 315.)

Illegal contract — action on.

A broker procured a customer for another broker, with the understanding that the latter should charge for the procuring a loan of money at a rate prohibited by the statute, and that such commissions should be divided; *held*, that a suit would not lie in behalf of the former broker for his share of such commissions against the latter broker, to whom they had been paid by the customer.

SUPREME COURT.—On rule to show cause why verdict should not be set aside.

The verdict was based on the following conclusions of fact: That each of the parties was doing a separate business in Jersey City, as brokers in real estate and in the procuring of loans for money.

That there was an arrangement between them that for any customer furnished by plaintiff to defendant, for whom the defendant should procure a loan, the commissions should be equally divided.

That in accordance with such arrangement, the defendant, in 1870, procured a loan of \$28,000, for one year, for Thomas Edmonston, at six per cent commission, and which commission was paid by Edmonston to defendant when the money was received by Edmonston.

That Edmonston was a customer furnished by the plaintiff to defendant, and the plaintiff is entitled to recover one-half of said commissions, unless prevented by reason of section five of the act against usury. The verdict was for one-half of the commissions, for which the suit was brought.

The plaintiff knew, when he furnished the customer, that the commissions would be at least six per cent on the amount of the loan.

The following question was certified for the advisory opinion of this court:—

Whether, by reason of section five of the usury act, the verdict can be sustained in whole or in part.

E. T. Cowles, for plaintiff.

Dixon, for defendant.

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BEASLEY, C. J. I think it is not to be denied that the money, which is the subject of the present suit, is the proceeds of an illegal transaction. The fifth section of the act against usury denounces a penalty against every broker who shall take or receive more than the rate or value of fifty cents for procuring the loan or forbearance of \$100 for a year. In the present affair six per cent premium was taken from the borrower by the defendant, with the knowledge and co-operation of the plaintiff. It is not, at this day, open to any question that a provision in a statute declaring that the doing of an act shall be visited by a prescribed penalty, is equivalent to an announcement that such act, if done, shall be illegal; so that if the borrower, in this case, had refused to pay the unlawful commissions agreed upon, no action could possibly have lain against him for such default. But this action is bottomed on the proposition that, inasmuch as the money has come to the hands of the defendant, and the plaintiff is entitled to one-half of it, the original transaction, out of which it arose, cannot be gone into, or at all events, cannot affect the claim in suit.

It is the general rule of the law, always admitted whenever the subject has been discussed, that a court of justice will not lend its aid to the enforcement of a contract, the making of which is prohibited, or which is directed to the accomplishment of any unlawful purpose. But while this salutary principle is thus broadly stated, there are some cases, and of the highest authority, which it is difficult not to regard as violations of its spirit. These decisions, as a class, are not harmonious, and some of the earlier of them have, on several occasions, undergone a severity of judicial criticism, which approaches closely to a dissent from the doctrines which they seek to establish. Each of such cases, however, claims to stand on some ground that makes it an exception to the general rule. First among these is *Tenant v. Elliott*, reported in 1 Bos. & Pull. p. 3. The defendant was a broker, and had effected an illegal insurance for the plaintiff, and the ship thus insured having been lost, he received the amount of insurance from the underwriters. Having refused to pay it over on demand, to the plaintiff, the suit was brought, which was successful, EYRE, Chief Justice, saying: "The question is, whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot." The same rule of decision

was applied in *Farmer v. Russell et al.*, 1 B. & P. 296, where the fund sought to be recovered, and which was outstanding in the hands of a third party, was the product of an act which was indictable and highly criminal. The suit was against a carrier, who had carried counterfeit coin for the plaintiff, and having received pay for it from the consignee, refused to hand it over. The court thought the case could not be distinguished from the antecedent one, which I have cited, and considered the sum claimed as so much money had and received by the carrier for the plaintiff, and that the original transaction did not affect the rights of such parties. These cases were founded on the theory that when the proceeds of an illegal, or what is the same thing, a criminal act, had passed into the possession of a third party, as an agent for the transfer of the money to the person for whom it was deposited, the contract implied by law that such money would be paid according to instructions, was so disconnected with the original transaction as to be unviti-ated by it.

And some of the decisions have pushed this doctrine even beyond this limit, for it has been held that in cases where there has been a partnership in a business carried on in violation of the provisions of a statute, such illegality will not bar a recovery by one partner against the other in a bill for an account of the gain of such traffic. Such were the views of Lord COTTENHAM in *Sharp v. Taylor*, 2 Phillips, 801. In support of the principle on which the judgment in this decision was rested, the only authorities cited were those already named, of *Tenant v. Elliott*, and *Farmer v. Russell*, and it is certainly clear that these cases do not support, to the whole extent, the doctrine for which they were vouched. The cases cited held that when the illegal transaction was completed, and the gains had been deposited with a third party in the course of transfer, the law would compel a payment by such intermediate agent; in advance of this, Lord COTTENHAM maintained that in case the illicit funds remained in the hands of one of the wrong-doers, the other could enforce his right to a division. The broad ground is laid and the case decided upon it, that there is a "difference between enforcing illegal contracts and asserting title to money which has arisen from them." And this view of the law has received the sanction of high judicial authority in this country. The doctrine of the last cited case was approved of by the Supreme Court of the United States in *McBlair v. Gibbs*, 17 How. 232, and was signifi-

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enforced if not considerably transcended, by the same tribunal in *Brooks v. Martin*, 2 Wall. 70. In New York the adjudications are in the same vein. *Woodworth v. Bennett*, 43 N. Y. 237, and *Merritt v. Millard*, 4 Keyes, 208, and vouchers for the proposition that where money derived from any illegal contract has been placed with a depository for one of the parties to it, such contract having been fully executed, an action to recover such money by the party for whom it was left, will be sustained.

This subject has, likewise, quite recently, been considered by the vice-chancellor, in the case of *Watson v. Murray*, 8 C. E. Green, 257. The bill was for an account with respect to the business of the carrying on of certain lotteries in which the complainant alleged he was a partner. It appeared in the pleadings that the lotteries were drawn and the business was transacted in States where such doings were lawful. It was not shown whether the contract of partnership was entered into in this State or elsewhere. The bill was dismissed on the demurrer, on the ground that as lotteries were in hostility to the general policy of this State, and were in themselves immoral, our courts would not take such affairs under their protection, although they were legal in the place where they had been transacted. In the course of his review of the subject, the vice-chancellor, as I interpret his remarks, exhibits a decided disapprobation of the extravagant length to which some of the decisions had gone in furtherance of illegal transactions.

But it thus appears that there is authority entitled to the very highest consideration in favor of the doctrine, that in cases where an illegal thing has been completely done, and the money growing out of such transaction being due to two or more persons, has been received by one of them for himself and his associates, or by a third person for such wrong-doers, an action will lie for such money in behalf of the party to whom it is coming, either in whole or in part. The principle seems to be that such right of action will arise when the circumstances are such, that the fund in question can be regarded as money received for the benefit of the party bringing the suit.

Now, it appears to me evident that this is extending the rule to the very verge of impolicy. When the avails of a criminal transaction are passed over by the court from the hands of a depository of them, as in the case of *Farmer v. Russell*, already cited, it is difficult to shake off an uncomfortable impression that the law has

given the last touch to the vicious transaction. Nor is the suggestion made in some of the opinions very re-assuring or satisfactory, that in these cases the transaction alleged to be illegal is completed and closed, and is not in any manner to be affected by what the court is asked to do between the parties, because it is impossible to overlook the circumstance, that if the law lends its aid to the transmission of the gains of the misdeed, the doing of the offense is facilitated in the future. Until the money, which is the wages of the ill-doing, has come into the hands of the several delinquents, the illegal transaction, so far as they are concerned, is not closed, and unless the matter has been entirely concluded by such adjudications that it would be but captiousness to dissent from them, it might well be worth consideration, whether it would not be more consistent with the usual course of the law, and more protective of public interest to proclaim the outlawry of such affairs from the first step to the last. If A and B make sale of forged paper, and the proceeds are paid by the purchaser to A, a court of law can scarcely be said to perform either a very respectable or a useful function when it assists B in obtaining his share of the profits of the business. Nor would it seem that it should give much concern to those who dispense public justice if one of two such delinquents should be successful in fraudulently withholding from his companion a share of the wages of the iniquity. Under such conditions the assistance of the law might, it would seem, be rightfully refused, not for the sake of the party who thus cheated his associate in guilt, but in order to render such affairs as precarious and difficult as possible to those who might be inclined to enter upon them.

But it does not seem important to follow this line of inquiry to a conclusion, inasmuch as such course is not essential to an adjudication of the question now before this court. The rule is certainly not to be carried beyond its scope, as defined in the decisions referred to, and that rule, comprehensive as it is, will not embrace the facts of the present case. The distinction is, that in this instance no money has been paid over, either to a partner of the plaintiff, or to a third party for him. Under the circumstances now presented, it is impossible to say that the defendant has money in his hands, which were paid to him, either in whole or in part for the plaintiff. These parties were not partners, for if they were, this suit would not lie, but the remedy would be in a court of equity. The defendant solely earned this money,

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by obtaining the loan in question, and the commissions were paid to him in his own individual right. The money he thus received was his own. The effect of his contract with the plaintiff was to make him indebted to him in the amount of one-half of the money thus earned by him. He is thus a debtor to the plaintiff, but he is such exclusively by force of his agreement with him. Now, the difficulty in the way of a recovery in this action is, that this agreement is illegal and void. The plaintiff knew that more than the legal rate would be charged by the defendant to the customer whom he produced, and the contract, therefore, was, that the defendant should charge the illegal rate, and would pay to the plaintiff one-half of these forbidden gains. The consequence is, the plaintiff relies on this contract, and is asking for its enforcement. No case has gone to such a length, but, to the contrary, the courts have distinctly refused so to do. In point of principle, the case of *Van Doren v. Staats*, decided in this court, and reported in Pennington, p. 887, is exactly applicable. The defendant was the holder of a lottery ticket, and agreed, for a sufficient consideration, to give the plaintiff a definite interest in it. To deal in such interest was prohibited by a law of this State. A prize was drawn, and a suit was commenced to compel the defendant to pay to the plaintiff his stipulated share in it. The argument was pressed, as it has been on this occasion, that the sum sued for was money received by the one party for the other, and that, therefore, the implied agreement, which formed the ground of the action, was removed from the original illegal transaction. But this argument did not prevail. The court saying, "the learned counsel for the plaintiff has very ingeniously endeavored to bring his client's case within the principle of those cases, by contending that the defendant received the money as agent for the plaintiff. But I think that this is not the correct interpretation of the transaction. The plaintiff was not known to the lottery company; he was no member of it. The agent of that company would not have been justifiable in paying any part of the money to him. If there was any agreement at all, it was this, that the plaintiff paid to the defendant \$3.50, on an agreement between them; that the defendant should pay to him one-third of the money that he should receive on that adventure; and this action is brought to enforce the fulfillment of that agreement. This agreement was in itself illegal, made in contravention of a statute of the State, and, in my opinion, the court cannot, with legal pro-

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priety, sustain the action." It is obvious that this precedent is so apt to the present purpose, that it would be necessary to disown its authority in order to clear the ground for a decision in favor of the plaintiff. I regard this adjudication as founded in a clear exposition, and accurate application of the correct rule of the law. This authority is in entire accord with the case of *Belden v. Pitken*, 2 Caines, 147. The defendant was possessed of a title to real estate belonging to a class, the sale of which was prohibited by law. The plaintiff procured a purchaser, under an agreement that he was to have a certain share of the proceeds, and the money was paid to the defendant, and the suit was brought to enforce the plaintiff's right to a share of this sum. But the court said: "In the present case, the object and consequence of the agreement was the sale of the pretended title. This being illegal, the promise to divide the spoil was of course illegal, and not to be enforced. All contracts that have a fraudulent object in view are void both at law and in equity."

Other cases having the same bearing might be cited, but in these days, when legal knowledge is so dearly acquired, and legal learning is so cheaply displayed, a voluminous citation of authorities is apt to look like a petit larceny on the digests.

The defendant is entitled to judgment, and the court should be so instructed.

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(36 N. J. [7 Vroom] 333.)

Interest — on judgment.

A judgment was entered when the legal rate of interest was six per cent.

Held, that such rate was not to be increased after the passage of an act making seven per cent the legal rate.

SUPREME COURT.—Several executions were issued on judgments obtained in this court, at the suit of William M. Cox, John R. Ely, Aaron Dawes, and Alfred Perrine, respectively, against the property of Benjamin Marlatt. The sheriffs of Middlesex and Mercer made sale of the defendant's property, under the executions, and the money

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was paid into court. By the order of this court, the amount raised upon the executions, \$5,419.30, was directed to be paid by the clerk, according to the priorities. The money raised not being sufficient to pay the amount of all the executions, the question was raised by Alfred Perrine, the last execution creditor, as to the amount of interest which should be computed on the judgment and execution of Aaron Dawes, his judgment being dated October 1, 1863. Dawes claims interest at the rate of six per cent from October 1, 1863, to March, 1866, and at the rate of seven per cent after the latter date, being the time of the enactment of the statute increasing the rate of interest.

Richey & Emery, for Alfred Perrine. -

M. Beasley, Jr., for Aaron Dawes.

SCUDDER, J. The allowance of interest on the several judgments is not questioned in this case, nor can it be according to the settled practice of the courts of this State. After much debate in the English courts, the law was settled by Stat. 1 & 2 Vict., ch. 110, § 17, which declares that every judgment debt shall carry interest at the rate of four per centum per annum, from the time of entering of the judgment, and from the time of the passage of the act in cases of judgment then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

Our practice has been, for many years, independent of any express statute, to allow interest to be levied under execution as an incident to the judgment, and as an increase of damages for the detention of the debt, without bringing a distinct action for the interest on damages for such detention.

It has also been held that the prior contract or right of action is extinguished by the judgment, as a higher security. The judgment is called a debt of record, which is the highest security a party can obtain at law.

Upon this general subject, see notes in *Selleck v. French*, 1 Am. Lead. Cases, 509; *Sedgwick on Damages*, 389; *Sayre v. Austin*, 3 Wend. 496; *Olden v. Hallett*, 2 South. 466.

Neither is it disputed between these parties that the court have control over the funds produced by these executions, whether in the hands of the sheriff or when paid into court.

This has also been definitely determined, and cannot now be controverted. *Stebbins v. Walker*, 2 Green, 90.

These preliminary points being conceded, the only question that remains for consideration is, whether, after a judgment has been obtained which carries a certain rate of interest under the then existing law, a change of that law by a subsequent statute, increasing or diminishing the former rate of interest, will affect the amount that can be collected under execution upon such judgment.

The effect of a judgment is to fix the rights of the parties thereto, by the solemn adjudication of a court having jurisdiction. How those rights can be affected by any subsequent legislation is not apparent. This contrast of the highest authority cannot be disturbed so long as it remains unreversed and unsatisfied.

Changing the rate of interest does not affect existing contracts, or debts due prior to such enactment, whether they be evidenced by statute, by judgment, or by agreement of the parties.

Such has been the uniform course of decision in our courts. *Verree v. Hughes*, 6 Halst. 91, is in point. The act against usury, passed February 8, 1797, fixed the rate of interest at seven per centum. By the act of December 5, 1823, the rate was changed from and after the fourth day of July, then next ensuing, to six per centum.

A judgment was entered November 29, 1825, on a bond bearing date June 6, 1809, which bore seven per cent interest. The bond, by the act of the party holding it, was merged in the judgment. While, therefore, interest was recoverable up to the time of the judgment, at seven per cent, upon the bond, when the judgment was entered, another debt was created under the then existing statute of 1823, and the court held that after the date of the judgment, the interest must be computed at six per cent.

In *North River Meadow Company v. Shrewsbury Church*, 2 Zab. 424, where an assessment for benefits to defendants' lands was made in 1823, prior to the act of that year going into effect, it was held that interest should be computed on such assessment, at the rate of seven per cent, and not the reduced rate of six per cent.

Also in equity the same rule has been held. Thus in *Wilson v. Marsh*, 2 Beas. 289, the complainants' bond and mortgage were made in Essex county, where interest could be taken by contract, at the rate of seven per cent, while the general statute allowed interest only at the rate of six per cent, the court adjudged that

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the decree upon foreclosure would bear only six per cent interest, although founded on a mortgage drawing seven per cent.

It will be seen that these cases are decided on the principles above stated, that the parties' rights are fixed by the judgment of the court, and the judgment carries with it its incidents, equally determined and all relating to the date of its entry.

If it be said that the interest is given as damages for the detention of the debt, and that the damages are greater when seven per cent interest can be had, than when only six could be obtained, and for such detention after the rate is increased, there should be additional damages allowed, the answer is, that there can be no second assessment where the amount of the debt or liability has been once adjudged, and the course of action remains the same.

The interest is the measure of damages for the detention, and that must relate to the time when the amount is fixed by the entry of judgment.

The order must be made to the clerk accordingly, that interest on the judgment of Aaron Dawes shall only be allowed and paid at the rate of six per cent from the date of its entry on October 1, 1868.

MESSENGER V. THE PENNSYLVANIA RAILROAD COMPANY.

(33 N. J. [7 Vroom] 407.)

Common Carrier — preference in carrying goods

An agreement by a railroad company to carry goods for certain persons, at a cheaper rate than it will carry under the same conditions for others, is void as creating an illegal preference.*

SUPREME COURT.—In case. On demurrer to declaration.

The declaration sets out (first and second counts) that the plaintiffs were large shippers of live hogs from Chicago and Pittsburg to Jersey City, and that the defendants, in the city of New York, on the 1st of December, 1870, agreed with the plaintiffs, that if they would ship by them, they would, on and after January 1,

* See *McDuffee v. Portland, etc., R. R. Co.*, ante, p. 12.

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1871, transport their hogs from Chicago and from Pittsburg, to Jersey City, at the regular rates, allowing them a drawback of twenty cents per hundred pounds upon all hogs shipped from Chicago, and ten cents per hundred upon those shipped from Pittsburg ; and further, should the defendants, after January 1, 1871, transport the same description of freight for others, between the same points, except seven parties named, at less than their regular rates, or should allow such others a drawback, then they should allow the plaintiffs such further drawback as would bring their freights twenty cents per hundred and ten cents per hundred lower than the lowest.

The plaintiffs aver that they shipped twelve millions of pounds from Chicago, and a like amount from Pittsburg to Jersey City by the defendants' road ; that they paid the regular rates, and have received the twenty cents and ten cents drawback, but the defendants, during the same year, carried for other parties than those excepted in the contract, allowing such parties the same drawback, or making a reduction in the rates equal to the drawback, whereby the plaintiffs became entitled to have a further drawback of twenty cents and ten cents per hundred.

The third and fourth counts set out like contracts, with like exceptions, by which the defendants agree to pay drawbacks equal to twenty cents and ten cents from the regular rates ; and further, that if either the defendants, the New York Central Railroad Company, or the Erie Railway Company, should rebate for other parties from the regular rates, or should give them drawbacks, then the defendants should allow the plaintiffs such further drawbacks as would make their rates twenty cents and ten cents lower than the lowest.

The fifth count sets out like contracts, made with the defendants, the New York Central Railroad Company and the Erie Railway Company, by which they severally agreed, for like shipments, to give the plaintiffs like drawbacks, and with the same exception as to other parties, to make the drawbacks twenty cents and ten cents per hundred lower than the lowest.

I. W. Scudder, for defendants.

Linn, for plaintiffs.

BEASLEY, C. J. The Pennsylvania Railroad Company, who are the defendants in this action, agreed with the plaintiffs to carry cer-

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tain merchandise for them, between certain termini, at a fixed rate less than they should carry between the same points for any other person. The allegation is, that goods have been carried for other parties at a certain rate below what the goods of the plaintiffs have been carried, and this suit is to enforce the foregoing stipulation. The question is, whether the agreement thus forming the foundation of the suit is legal.

There can be no doubt that an agreement of this kind is calculated to give an important advantage to one dealer over other dealers, and it is equally clear, that if the power to make the present engagement exists, many branches of business are at the mercy of these companies. A merchant who can transport his wares to market at a less cost than his rivals, will soon acquire, by underselling them, a practical monopoly of the business; and it is obvious, that this result can often be brought about if the rule is, as the plaintiffs contend that it is, that these bargains giving preferences can be made. A railroad is not, in general, subject to much competition in the business between its termini; the difficulty in getting a charter and the immense expense in building and equipping a road, leaves it, in the main, without a rival in the field of its operation; and the consequence is, the trader who can transmit his merchandise over it on terms more favorable than others can obtain, is in a fair way of ruling the market. The tendency of such compacts is adverse to the public welfare, which is materially dependent on commercial competition and the absence of monopolies. Consequently, the inquiry is of moment, whether such compacts may be made. I have examined the cases, and none that I have seen is, in all respects, in point, so that the problem is to be solved by a recurrence to the general principles of the law.

The defendants are common carriers, and it is contended that bailees of that character cannot give a preference in the exercise of their calling, to one dealer over another. It cannot be denied, that, at the common law, every person, under identical conditions, had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action, unless he could show a reasonable ground for his refusal. Thus, in the very foundation and substance of the business, there was inherent a rule which excluded a preference of one consignor

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of goods over another. The duty to receive and carry was due to every member of the community, and in an equal measure to each. Nothing can be clearer than that under the prevalence of this principle, a common carrier could not agree to carry one man's goods in preference to those of another.

It is important to remark, that this obligation of this class of bailees is always said to arise out of the character of the business. Sir William Jones, importing the expression from the older reports, declares that this, as well as the other peculiar responsibilities of the common carrier, is founded in the consideration that the calling is a public employment. Indeed, the compulsion to serve all that apply could be justified in no other way, as the right to accept or reject an offer of business is necessarily incident to all private traffic.

Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and, therefore, to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree, the principle of public policy which, in his own dispute, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rules that the carrier shall receive all the goods tendered, loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a

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reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge, for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable; a presumption which would cut up by the roots the present agreement, as, by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants.

From these considerations, it seems to me, that testing the duties of this class of bailees by the standard of the ancient principles of the law, the agreement now under examination cannot be sanctioned. This is the sense in which Mr. Smith understands the common-law rule. In his *Leading Cases*, p. 174, speaking of the liabilities of carriers, he says: "The hire charged must be no more than a reasonable remuneration to the carrier, and consequently not more to one (though a rival carrier) than to another, for the same service." * I am aware, that in the case of *Baxendale v. The Eastern Counties Railway*, 4 C. B. (N. S.) 81, this definition of the common-law rule was criticised by one of the judges, but the subject was not important in that case, and was not discussed, and the expression of opinion with respect to it was entirely cursory. Indeed, the whole question has become of no moment in the English law, as the subject is specifically regulated by the statute 17 and 18 Vict., ch. 31, which prohibits the giving "of any undue or unreasonable preference or advantage to, or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." The date of this act is 1854, and since that time the decisions of the courts of Westminster have, when discussing this class of the responsibilities of common carriers, been devoted to its exposition. But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law. This was so held in the case of *Sandford v. The Catawissa, Williamsport & Erie*

* We suppose this reference is to the note to *Oggs v. Bernard*, 1 Smith's *Leading Cases*, 809 (7th ed.). It is not, however, in the language of the last American edition. On page 888 of that edition (marginal p. 801) it is said: "The hire charged must be no more than a reasonable remuneration to the carrier, though at common law there is no liability to carry at equal rates for all customers."—Rep. Am. R.

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Railroad Co., 24 Penn. 378, in which an agreement by a railway company to give an express company the exclusive right to carry goods in certain trains, was pronounced to be illegal. In a more recent decision, Mr. Justice STRONG refers to this case with approval, and says that the special provisions which are sometimes inserted in railroad charters, in restraint of undue preferences, are "but declaratory of what the common law now is." This is the view which, for the reasons already given, I deem correct.

But even if this result could not be reached by fair induction from the ancient principles which regulate the relationship between this class of bailees and their employers, I should still be of opinion that we would be necessarily led to it by another consideration.

I have insisted that a common carrier was to be regarded, to some extent at least, as clothed with a public capacity, and I now maintain, that even if this theory should be rejected, and thrown out of the argument, still the defendants must be considered as invested with that attribute. In my opinion, a railroad company, constituted under statutory authority, is not only, by force of its inherent nature, a common carrier, as was held in the case of *Palmer v. Grand Junction Railway*, 4 M. & W. 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although, in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the general good. If they had remained under the control of the State, it could not be pretended, that in the exercise of them, it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of every thing like favoritism with respect to its use, would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. And it seems to me impossible to concede, that when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. I think they are, unalterably, parts of the supreme authority, and in whatsoever hands they may be found, they must be considered as such. In the use

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of such franchises, all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants, that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is, they must, in the exercise of their calling, observe to all men a perfect impartiality. On these grounds, the contract now in suit must be deemed illegal in the very particular on which a recovery is sought.

The result is, the defendants must have judgment on the demurrer.

Judgment accordingly.

EDWARDS V. ELLIOTT.

(26 N. J. [7 Vroom] 449.)

THE Supreme Court of the United States having affirmed this case, and the important part of the opinion having been published in the note, *ante*, 273, it is not thought necessary to do more than to refer to it in this place. The question involved was the constitutionality of an act making claims for work done, materials furnished, etc., in building ships or vessels, a lien thereon, and providing means for enforcing such lien.—REP.

The State v. The Mayor and Common Council of the City of Newark.

THE STATE, THE PROTESTANT FOSTER HOME SOCIETY OF THE CITY
OF NEWARK, Prosecutors, v. THE MAYOR AND COMMON COUN-
CIL OF THE CITY OF NEWARK.

(26 N. J. [7 Vroom] 472.)

Assessments for benefits—Exemption.

The act incorporating the prosecutors declares that their property "shall not be subject to taxes or assessments." *Held*, that the words "taxes or assessments" are not synonymous, and that they exempt the property from assessments for benefits as well as from taxes for general revenue for public use. Reversing same case, 10 Am. R. 223.

COURT OF ERRORS AND APPEALS.—On error to the Supreme Court.

H. Young and C. Parker, for plaintiffs in error.

Wm. H. Francis, for defendants.

DODD, J. The Protestant Foster Home Society of the city of Newark was incorporated by an act approved February 28, 1849, having for its object to provide for the support of destitute children of that city, who might be suffering from the inability, neglect, or death of their parents. It was empowered to hold real estate, and by the contributions of benevolent persons, became the owner of a number of acres in the outskirts of the city. In 1869, two assessments for benefits were made against these lands, one for opening Sumner avenue, and the other for curbing and flagging Second avenue, both amounting to \$10,886.82. Payment was refused, and the assessments were brought by *certiorari* to the Supreme Court, where their legality was disputed on the ground that the society's charter enacts that its property "shall not be subject to taxes or assessments." The judgment of that tribunal affirming the liability, is brought here by writ of error, and the single question is, are the assessments complained of within the exempting words of the charter?

I think that they are, and while recognizing to its fullest extent the indisputable doctrine relied on by the learned justice in his

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opinion below, that no person or corporation can be exempted from taxation, except by express words or necessary implication equally strong, I am constrained to admit, that the legislative intent is in this instance too clearly and distinctly expressed to be open to doubt. In interpreting statutes, words must be taken in their plain and natural sense; the sense given to them by approved and general usage. The exempting words here are, "taxes or assessments." In popular acceptation, in legislative enactments and in judicial decisions, these words have a different meaning, apply to different matters and cannot be treated as synonymous terms. This being so, no supposed impolicy of the exemption itself can be available to govern the judicial construction of the words.

In the charter of Newark, under which the assessments were made, the word "taxes" refers exclusively to impositions for general revenue for the public uses of the city, county or State. They are levied on principles not applicable to exactions for special benefits derived from local improvements, which exactions the charter denominates assessments. This is true of the original charter of 1836 and of the revision in 1857.

The distinction in the legal meaning of the words is recognized and acted on in the decided cases in this State where the attempt has been made to obtain exemption from these special assessments, on the ground that they were included within the word "taxes." These cases have been cited to sustain the judgment below, but they go wholly and decisively, I think, to a contrary result. They establish clearly that assessments are not taxes, in the ordinary legislative sense of the words. They so expressly declare. In the case of the *City of Paterson v. The Society for Establishing Useful Manufactures*, 4 Zab. 385, the expenses of grading and paving a street had been assessed upon lots owned by the defendants, and such assessments were held by the Supreme Court not to be a tax within the meaning of the defendants' charter, which exempted their property from "all taxes, charges and impositions under the authority of the State." It was said that the words "taxes, charges and impositions" specified in the charter, were manifestly those only for public or general use. The same view was taken in *The State v. The City of Newark*, 3 Dutch. 185. An assessment for benefits was discriminated from taxes or impositions. In neither case was the word "assessment" employed in the exempting clause of the charter. This recognition by our own courts, of

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the essential difference between the words "taxes and assessments," as expressive of essentially different things, would seem to be conclusive against holding them, in this case, to be simply identical in meaning. Unless so held, the assessment in this case is plainly illegal.

The distinction between them is fully exhibited in the case of *Emery v. San Francisco Gas Co.*, 28 Cal. 845, where the above-mentioned decisions of this State are cited among others to illustrate and enforce it. The language of the court was as follows: "The different significations of the terms 'taxes and assessments' will be found, upon examination, to be well established in the legal language of the several States, and to run through the statutes, and to have been recognized and enforced by the various judicial tribunals of the country, and to have found their way into the constitutions of many of the States." Numerous references are made in the opinion from which this language is taken to justify the correctness of the statements contained in it.

As before remarked, the policy or impolicy of thus exempting property—even that of purely charitable or religious corporations—from payments of benefits, increasing its value to the extent of the assessment, cannot now be considered. It is admitted, that the legislative power to exempt it is clear, and it must be held, that in this case the power has been clearly exerted. If impolitic or wrong, the exemption may be annulled by the power that created it, but not by the courts.

The judgment below should be reversed, and the assessments against the prosecutors set aside.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, SCUDDER, DODD, GREEN, OGDEN, WALES—7.

For affirmance—BEDLE—1.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

**WAFFLE, appellant, v. THE NEW YORK CENTRAL RAILROAD
COMPANY.**

(88 N. Y. 11.)

Surface water—right of land-owner to drain surface water into stream.

Defendant dug ditches in its own land to drain the surface water therefrom into a stream which was its natural outlet, thereby sometimes increasing and at other times decreasing the quantity of water in the stream, to the injury of plaintiff, who was an inferior heritor. *Held*, that plaintiff had no cause of action.

ACTION by George Waffle against the New York Central R. R. Co. to recover damages for an alleged interference by defendant with the flow of the waters of Little Black creek, in the town of Gates. Plaintiff was the owner of a saw-mill on said creek. Defendant in order to drain off the surface water from its lands dug ditches upon its own land whereby the water was discharged into the creek, which was the natural outlet of such waters. The water being thus carried off more directly and expeditiously, greatly increased the volume of water in the creek in times of high water and diminished it in times of low water, thereby affecting the use of plaintiff's mill.

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The other facts appear in the opinion. At the trial defendant's counsel moved for a nonsuit, which was granted, and this order was affirmed by the general term of the Supreme Court. Plaintiff appealed.

George E. Ripsom, for appellant. Plaintiff had a right to have the surface waters of the stream above him flow to him in their usual and natural way. *Clinton v. Myers*, 46 N. Y. 511; S. C., 7 Am. Rep. 373; *Earl v. De Hart*, 1 Beasley (N. J.), 280, 283, 284; *Halsman v. Boiling Spring Bl. Co.* 1 McC. (14 N. J. Ch.), 335, 342; *Kauffman v. Criesimer*, 26 Penn. St. 407; *Martin v. Riddle*, id. 415; *Williams v. Gale*, 3 H. & J. 231; *Potter v. Peck*, 16 Ohio St. 334; *Martin v. Jett*, 12 Ala. 501; *Dickinson v. Worcester*, 7 id. 19, 22; *Brand v. Murphy*, 37 Vt. 99; *Belknap v. Trimble*, 3 Paige, 577, 605; *Haight v. Price*, 31 N. Y. 241. Plaintiff had a right to have the whole stream pass that point of its course in its natural bed. *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *Cott v. Lewiston R. R. Co.*, 86 id. 214; *Pixley v. Clark*, 35 id. 520.

Edward Harris, for respondent.

GROVER, J. The evidence did not show that the ditches made by the defendant diverted water into the stream upon which the plaintiff's saw-mill was situated, which had any other outlet than into such creek. Had that been proved, and that the plaintiff sustained an injury from an increased quantity flowing in the stream, he would have been entitled to recover therefor. By cutting the ditches through the bluffs the water reached the stream by a shorter and more direct course than it before had done. The defendant's ditches discharged the water into the stream nearly two miles above the plaintiff's mill. They were nearly two miles in length, diverted running water communicated with no stream except at the point where they discharged into the creek upon the land of the defendant. They conducted the surface water from a considerable area of low, swampy land, and in high water discharged into the stream comparatively a large quantity of water, caused the water at such times to rise higher at the plaintiff's mill than it otherwise would, and to some extent prevented the use of the mill by back water, and at other times reduced the quantity of the water flowing in the stream so that it was not sufficient to operate the machinery. This

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gave no right of action to the plaintiff. The defendant had an absolute right to drain the surface water upon its land into the stream, which was its natural outlet, through ditches constructed upon its own land, although the quantity of water in the stream was thereby increased in times of high water, and diminished at other times. Angell on Water-courses (6th ed.), § 108 *a* to 108 *s*. The authorities in this country and England upon this subject are collected and revised by the author, and clearly establish the right claimed by the defendant. *Goodale v. Tuttle*, 29 N. Y. 459; *Rawstron v. Taylor*, 11 Exch. 369; *Gannon v. Hargadon*, 10 Allen, 106; *Miller v. Laubach*, 47 Penn. 154. A proprietor having the right to reclaim his land by draining the surface water therefrom, by ditches discharging into a stream running thereon which is the natural outlet of the water, the object of doing so, whether for the erection of buildings, agriculture, or constructing a railroad thereon, is wholly immaterial. He may so drain whenever disposed to do so, irrespective of the object.

The counsel for the appellant cites *Clinton v. Myers*, 46 N. Y. 511; S. O., 7 Am. Rep. 373, as in conflict with this view. There is no such conflict. The right of a proprietor to drain surface water from his land was not at all involved in that case. There the question was whether a proprietor had a right to erect a dam across a stream so as to detain a large quantity of water and store the same for future use, and discharge the same in quantities adapted to his own machinery, but not to that of a proprietor upon the stream below. Held, that he had no such right. The stream in question was a permanent stream, and whether formed by the union of the outlets of numerous springs in the vicinity of the dam, or had a more remote origin, was immaterial. In the present case the surface water was discharged through the ditches into the stream. There is in the case no question as to the rights of a proprietor of lands situate lower to be protected from a discharge of surface water in unusual quantities at particular points upon his land by artificial structures situated higher, and, therefore, that will not be considered.

The nonsuit was rightly granted, and the judgment of the general term affirming the judgment entered thereon must be affirmed.

Judgment affirmed.

MUNN, appellant, v. WORRALL.

(33 N. Y. 44.)

Deed — exception "of part taken for a road."

Grant by deed of land, "saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as has been lawfully taken for a public road." *Held*, that the fee in the soil of the road, and not merely an easement, was reserved to the grantor.

SUIT by appellant for an injunction to restrain the defendant from digging upon two strips of land formerly constituting highways, extending through the lands of defendant. Defendant claimed title to said strips through a deed from one Tillou, which, after describing the premises conveyed, contained this exception.

"But saving and excepting from the premises hereby conveyed all, and so much, and such part and parts thereof as has or have been lawfully taken for a public road or roads." At the time of such conveyance there were across said premises two public highways regularly laid out. These roads were worked and used until 1840, when they appear to have been abandoned. The lands covered by these roads were, in 1856, conveyed by Tillou to plaintiff, and are the "strips of land" in question. Defendant had entered and dug upon these lands and threatened to continue so to do.

The special term held that plaintiff acquired no title under his deed, was not the owner of the lands in question, and could not maintain his action, and directed judgment for defendant. The general term affirmed the judgment, and plaintiff appealed.

C. Frost, for appellant.

Amasa J. Parker, for respondent. Plaintiff cannot ask for an injunction until he has first established his title in an action of ejectment. *Storm v. Mann*, 5 Johns. Ch. 21. All uncertainties in a deed may be taken in favor of the grantee. *Jackson v. Hudson*, 3 Johns. 375; *Jackson v. Gardner*, 8 id. 394; *Hathaway v. Power*, 6 Hill, 453. The intention of the parties, as gathered from the whole deed, is to prevail. *Marquand v. Marquand*, 4 Edw. Ch. 711. The deed must be so construed as to give effect to every part of it. *Moore v. Jackson*, 4 Wend. 58. Where a road or

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highway is excepted in a deed, the exception is of the easement and not of the fee of the land. *Leavitt v. Towle*, 8 N. H. 96; *Peck v. Smith*, 1 Conn. 103; *Richardson v. Palmer*, 38 N. H. 213; *Graves v. Amoskeag*, 44 id. 462; *Hays v. Askew*, 5 Jones' L. (N. C.) 63; *Swick v. Sears*, 1 Hill, 17; *Hurd v. Curtis*, 7 Metc. 110; *Pettie v. Howes*, 13 Pick. 323; *Caradine v. Caradine*, 33 Miss. 698; *Keeler v. Wood*, 36 Vt. (1 Shaw.) 242.

RAPALLO, J. A person through whose lands a highway is laid out may convey the land on each side, retaining the fee of the premises covered by the highway. *Jackson v. Hathaway*, 15 Johns. 447, 454; *Child v. Starr*, 4 Hill, 378. This result may be accomplished by so framing the description as to exclude the land covered by the highway, or by inserting in the deed proper and apt words to except such land from the premises conveyed by the general description. An owner who has thus retained his estate in the soil, incumbered by a road, has a right to sell it, subject to that incumbrance. *Jackson v. Hathaway*, *supra*, 454. In the present case, Tillou, the plaintiff's grantor, conveyed to Warner the premises through which the road in question runs, with the following exceptions: "saving and excepting from the premises hereby conveyed all, and so much, and such part and parts thereof as has or have been lawfully taken for a public road or roads." It is claimed on the part of the respondent that this clause did not except the land covered by the road, but only the easement therein which the public had acquired by the laying out of the road, and that consequently the fee in such land, subject to the easement, passed by the deed to the grantee, notwithstanding the exception. After a careful consideration of the language of the exception, and of the authorities cited by the learned counsel for the respondent, in support of his interpretation of it, we are of opinion that the exception was of the land, and that it cannot be confined to the easement without doing violence to the language used. The exception does not purport to be of any particular estate or interest in the land, but is in terms of a certain part and parcel of the premises embraced within the boundaries set forth in the deed. It is not an exception from the estate of the grantor, but from the premises, and specifies the portion excepted. For the purpose of identifying the excepted parcel, it is described as that part of the premises which has been lawfully taken for a public road.

In this respect the exception differs from those which were adjudicated upon in the numerous cases cited on the part of the respondent, for the purpose of establishing that an exception of a "road" or of a "highway" does not exclude the fee of the land over which the road or highway is laid out. *Peck v. Smith*, 1 Conn. 103, is the leading case cited in support of that position, but upon examination it will be found not decisive, even of the point last referred to. The language of the exception there was, "saving and excepting the road or highway laid out," etc. Opinions were delivered *seriatim* by nine judges. Four only held distinctly that the term "highway" or "road," did not necessarily mean the land over which the road or highway passed, and that, therefore, only the easement was excepted. Three others held, with equal positiveness, that the exception was good as an exception of the land. One other, that it would have been good if the grantor had had any estate in the land occupied by the road which he could have reserved to himself, but that the fee was in the public, and therefore it was impossible that he could have reserved it to himself. The remaining judge expressed no opinion as to the effect of the exception, but placed his judgment on the ground that the fee was in the public. There was, therefore, so far as opinions were expressed, an equal division as to the interpretation of the exception.

In *Leavitt v. Towle*, 8 N. H. 96, the exception was of a "road" laid out through the premises. The court, citing *Peck v. Smith*, held that "a road" was a right of passage merely, and the soil over which it passed would not be transferred by a conveyance of the road. In *Richardson v. Palmer*, 38 N. H. 213, there was a reservation, not to the grantor, but to a stranger (the White Mountain Railroad), of the roadway for its road as laid out by the commissioners. Of course this reservation could not enlarge the interest previously vested in the railroad company. *Graves v. Amoskeag Co.*, 44 N. H. 462, followed *Leavitt v. Towle*, and held that a grant of "a road two rods wide, from the ferry to the great road," conveyed only an easement, unless it appeared that the grantor owned only the land occupied by the road, in which case the description might be sufficient to convey the land. In *Hays v. Askeu*, 5 Jones' Law (N. C. 63), and *Keeler v. Wood*, 30 Vt. 242, the meaning of the reservation was controlled by the expression of the purpose for which it was made. In *Swick v. Sears* 1 Hill, 17, the reservation was of "the undivided third of the premises,

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which was covered by the dower right of O.," and was held to describe only the interest of the doweress. If the dower had been at the time actually admeasured, and the deed had excepted "from the premises conveyed that part thereof which had been set off to O. on the admeasurement of her dower," the case would have been analogous to the present one, and I apprehend the conclusion would have been different.

None of the cases referred to present the feature which exists in the present case, of an exception, *from the premises* described, of a specific portion of *such premises*.

It is argued that, because the portion excepted is described as that part of the premises which has been *lawfully taken* for a public road, and only an easement therein could be lawfully so taken, therefore an easement only was excepted. We cannot so understand the language; the word "premises," we think, clearly means, in the connection in which it is used, the tract of land described in the deed, and not the estate or interest of the grantor, and the exception was of a portion of such premises, and not of an interest therein. By describing the excepted part as that portion which has been lawfully taken for a public road or roads, lands used as private roads, or roads not lawfully established, were excluded from the exception. The purpose of the expression was manifestly to designate with accuracy what portion of the premises was intended to be excepted.

The court below found, that the premises in controversy, at the time of conveyance from Tillou to Warner, were included in and formed part of public roads passing over the property. We think that the fee therein was excepted from the conveyance, and remained in Tillou, and passed by his subsequent conveyance to the plaintiff, and that the court therefore erred in the conclusion that the plaintiff was not the owner thereof, or of any right, title or interest therein.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

SMITH, plaintiff in error, v. THE PEOPLE.

(33 N. Y. 111.)

Larceny — obtaining property by artifice.

Defendant falsely represented to the wife of M. that M. had been arrested for a crime, and had sent him to her for some money. The wife gave him a watch and chain to pawn, the money and ticket to be given to M. Defendant made the representations and received the goods with the intent to appropriate the same to his own use. *Held*, that he was guilty of larceny. If by trick or artifice the owner of property is induced to part with the custody or naked possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny.*

INDICTMENT for grand larceny. The plaintiff in error upon the 19th day of July, 1872, called upon one Sarah March and informed her that her husband had been arrested on a criminal charge and had sent him for money. Not having the money, and at the solicitation of the plaintiff in error, believing his statement to be true, the wife gave him a watch, chain, and a locket or cross, and two dollars in money, belonging to her husband, which property he was to pawn and give the ticket and money to her husband. The statement of the prisoner was false. The husband never had been arrested, never sent him for any money, and did not know him. The plaintiff in error appropriated the property so obtained to his own use.

The court charged the jury, in substance, that if they believed the evidence of the prosecution and that the prisoner at the time of the taking had the felonious intent to appropriate the property, it was larceny, to which the prisoner's counsel excepted. The jury rendered a verdict of guilty. The supreme court affirmed the judgment entered on the verdict, and the defendant brought error.

William, F. Kintzing, for plaintiff in error. The court erred in charging the jury that upon the facts they could convict of larceny 2 East's P. C. 553; Whart. Am. Cr. Law (5th rev. ed.), 1752. The felonious intent must exist at the time of the taking to constitute

* See *Defrese v. State*, 8 Am. Rep. 1 (3 Helsk. 53) wherein it was held that obtaining property by a trick, known as the "five cent trick" was larceny.

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larceny. *People v. Wilson*, 39 N. Y. 460; *People v. Call*, 1 Den. 120; *People v. Anderson*, 14 Johns. 294. Where one parts with his property, voluntarily consenting thereto, it cannot be larceny, however fraudulent the means by which it was obtained. 2 East's P. C. 688, and cases cited; *Ross v. People*, 5 Hill, 294; 1 Archb. Cr. Pl. 895; Whart. Am. Cr. Law (5th rev. ed.), 1789; 1 Russ. on Crimes, 563; *Lewer v. Commonwealth*, 15 Serg. & Rawle, 93; *Commonwealth v. James*, 2 B. & H. Lead. Cr. Cas. (2d rev. ed.) 181, 204; *Blunt v. Commonwealth*, 4 Leigh, 689; *Rex v. Jackson*, 1 Moody's C. C. 119; *Mowrey v. Walsh*, 8 Cow. 238; *Regina v. Barnes*, 2 Den. C. C. 59; *Reg. v. Adams*, 1 id. 38; *Rex v. Adams*, Russ. & Ry. C. C. 225; *Reg. v. Thomas*, 9 Carr. & P. 741. The judgment should be reversed and the prisoner discharged. *Ranney v. People*, 22 N. Y. 413; *McCord v. People*, 46 id.

Benjamin K. Phelps, for defendants in error.

ALLEN, J. The accused obtained the custody of the chattels and money of the prosecutor from his wife by a fraudulent device and trick, and for a special purpose, connected with the falsely represented necessities of the owner, with the felonious attempt to appropriate the same to his own use. He did not pawn or pledge the goods, as he proposed to do, but did appropriate the same to his own use, in pursuance of the felonious attempt with which he received them. This constitutes the crime of larceny. The owner did not part with the property in the chattels, or transfer the legal possession. The accused had merely the custody; the possession and ownership remaining in the original proprietor. The proposition is elementary that larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*. Per COWEN, J., *Cary v. Hotailing*, 1 Hill. 311; Am. Crim. Law, by Wharton, § 1847, *et seq.*; *Reg. v. Smith*, 1 C. & K. 423; *Reg. v. Beaman*, 1 C. & M. 595; *Reg. v. Evans*, id. 632.

The rule is, that when the delivery of goods is made for a certain special and particular purpose, the possession is still supposed to reside, not parted with, in the first proprietor. It is stated that if a watchmaker steal a watch delivered him to clean, or if a person steals clothes delivered for the purpose of being washed, or guineas delivered for the purpose of being changed into half guineas, or a watch delivered for the purpose of being pawned, the goods have

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been thought to remain in the possession of the proprietor, and the taking them away held to be a felony. 1 Hawk. P. C. 33, § 10; 2 Russell on Crimes, 22. A distinction is made between a bare charge or special use of the goods, and a general bailment; and it is not larceny if the owner intends to part with the property, and deliver the possession absolutely, although he has been induced to part with the goods by fraudulent means. If by trick or artifice the owner of property is induced to part with the custody or naked possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but the right of property also, the offense of the party obtaining them will not be larceny, but that of obtaining goods by false pretenses. *Ross v. People*, 5 Hill, 294; *Lewer v. Commonwealth*, 15 S. & R. 93; 2 Russell on Crimes, 28. Here the jury have found the intent to steal at the time of taking, which is all that is required to constitute larceny, where the mere possession is obtained by fraud or trick. *Wilson v. People*, 39 N. Y. 459; *People v. Call*, 1 Den. 120; *People v. McDonald*, 43 N. Y. 61.

The conviction was right, and the judgment must be affirmed.

Judgment affirmed.

ANSONIA BRASS AND COPPER COMPANY v. NEW LAMP CHIMNEY COMPANY, appellant.

(33 N. Y. 123.)

Bankruptcy — of corporation — subsequent action against.

Under the United States bankrupt law a creditor proved his debt in bankrupt proceedings against a corporation. *Held*, that the corporation was not thereby discharged, and that the debt might be prosecuted in a State court.

ACTION by the Ansonia Brass and Copper Company against The New Lamp Chimney Company, upon nine promissory notes made by defendant. It appeared that defendant had been declared bankrupt and plaintiff had proved its claims in the bankruptcy proceedings, and had received a dividend. The defense was, that under section 21 of the United States bankrupt act, the plaintiff's right of action was waived. Judgment was rendered for plaintiff for the balance of the notes after applying the dividends. The general term affirmed the judgment. Defendant appealed to this court.

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John M. Martin, for appellant. 14 U. S. Stat. at Large, 517; 5 id. 455, § 5; 5 L. R. 165; *Huton v. Corse*, 4 Edw. 585, 587; affirmed, 2 Barb. Ch. 508, 581; *Stewart v. Isidor*, 5 Abb. Pr. (N. S.) 68, 72; *Hoyt v. Freal*, 8 id. 220; James' Bankrupt Law, 1867, 97, note, and cases cited.

Roger A. Pryor for, respondent. 14 U. S. Stat. at Large, 517, § 37; *In re Robinson*, 6 Blatch. C. C. 253; *In re Kimball*, id. 292; *In re Rosenberg*, 3 Bene. 14; *In re Wright*, 36 How. Pr. 176; *In re Migel*, 2 Bankr. Reg. 153; *Davis v. Anderson*, 6 id. 153.

FOLGER, J. The appellant claims that by virtue of the twenty-first section of the United States bankrupt act (Laws of U. S., 14 Stat. at Large, p. 517), the plaintiff having proved its debt against the defendant, shall not be allowed to maintain its suit therefor against the defendant, but shall be deemed to have waived all right of action against it. This action is very broad in its terms. In its unrestricted import, it does give plausibility to the position of the defendant. Without attempting to determine, from an interpretation of the section itself, whether such a claim is in all cases well founded, it is sufficient to put the decision of this case upon the ground which we shall state. This twenty-first section may not stand alone. It is to be read and applied in connection with every other section of the act. All must have their due and conjoint effect. Each must be so far qualified and limited by each other as that all may have operation in harmony, if so it may be. And each must be kept in subservience to the general intent of the whole enactment. The thirty-seventh section of the act is the one by which corporations are brought within its scope and operation. It was under this section that the defendant came into the bankrupt court. That section, while enacting that the act shall apply to corporations, and prescribing the manner in which they may voluntarily apply to the court, or be brought to it involuntarily, and enumerating many particulars in which the provisions applicable to natural persons, debtors, shall be applicable to corporations, does not provide for granting to them a discharge from their debts. On the contrary, it does enact that "no allowance or discharge shall be granted to any corporation." It would be strange if one portion of this section was not to be held of as much moment as another, and that while it was effectual to bring the corporation

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into the bankrupt court it should be ineffectual to prevent the granting to it of a discharge; the prohibitory portion being just as explicit as that which is permissive. And such construction would be to annul an important part of the section. It is to be adopted on no other reason than that the clause above quoted is so inconsistent and hostile with the whole tenor and intent of the act, or with other particular provisions of it, as that it cannot stand in harmony with them. The intent of the act is to permit the honest bankrupt, being a natural person, to give up all his assets, to divide them *pro rata* among his creditors, and to get a discharge from his debts honestly contracted. Its purpose to the individual in this is, to free his faculties from the clog of his indebtedness, so that he may start again with fresh hope and the fresh energy kindled thereby. Its purpose to the public is, that no one may be under the discouragement of debt, deadening his activity, and preventing his utmost endeavor for self-support, and for the material advancement of the community. Neither of these objects are of importance where a corporation is concerned. Though freed from its debts, on giving up all of its assets, it has no power for its own or for public good until it has capital again. But that is then to be had only from individual resources, and they may as well be applied to the purpose through other agencies.

Again, a prime purpose of the act might be thwarted if a corporation was discharged from its debts. Very many corporations are formed under laws which affix to the several stockholders an individual liability to a greater or less extent for the debts of the corporation. These debts are thus made, in the end, the debts of the stockholders. This liability does not accrue until the corporation has itself failed to meet its indebtedness. If the corporation, on the action of the stockholders (as it can be), is brought into the bankrupt court and discharged from its debts, they being thus extinguished, the liability of the stockholders will never accrue, and they go free, with their assets still theirs. This would be to frustrate an important purpose of the act, which only relieves from liability upon a surrender of property to be applied thereon.

The fact, too, that the thirty-seventh section prohibits any allowance to corporations, as well as any discharge, indicates the purpose of the act to discriminate between them and natural persons. Nor is the provision of the thirty-seventh section incapable of harmonious action together with the twenty-first section. It would

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not have been unusual nor discordant legal composition if the twenty-first section had been drafted just as broadly as it now reads, and there had been added to it a saving clause or proviso that it should not apply to the case of a corporation so as to discharge it from its debts, or prevent an action being maintained against it on any debt which had been proven. A saving clause is something smaller than the thing itself and yet not nullifying it. Dwarris, 513; 4 Kent, 468. Nor would there have been any reason for doubt but that a case of a corporation was then excepted from the general effect of the section, so far as it worked a discharge of the debts of the bankrupt. It does not matter that the saving clause appears further on in the act, and is in other guise than a proviso. It is just as operative to save and except from the force of the general provision, and is just as consistent and harmonious with it as if it followed at its heel. Nor is this the only instance in which from restrictive or influencing provisions of other sections of the act, the broad terms of the twenty-first section suffer an abatement of their force and compass.

The thirty-third section provides that no debt created by the fraud of the bankrupt shall be discharged under the act. And it has been held that the debt of the creditor which had been proven, and which came within the terms of the twenty-first section, was, by virtue of the thirty-third section, excepted from the full scope of those terms, and was not discharged. Per NELSON, J., in *Ex parte Robinson*, 6 Blatchf. C. C. 253; S. C., 2 Bankr. Reg. 108. *In re Rosenberg*, 2 Bankr. Reg. 81, it is said: "No consequences can be allowed, under section twenty-one, to flow from proving a debt, which are inconsistent with the provisions of section thirty-three." This remark is equally applicable to section thirty-seven when collated with section twenty-one.

We conclude, therefore, that section twenty-one has not universal and exclusive effect, and that section thirty-seven prohibiting a discharge to a corporation, the plaintiff's debt is not discharged though proven, and may be prosecuted in the State court.

It is not necessary to consider the question raised and argued, whether the bankrupt court had jurisdiction.

The judgment appealed from should be affirmed, with costs to the respondent.

All concur.

Judgment affirmed.

PEOPLE *ex rel.* DUNKIRK, ETC., R. R. CO. v. BATCHELOR, appellant.

(28 N. Y. 122.)

Constitutional law. Town bonding in aid of railroads. Mandatory legislation. Peremptory mandamus.

A mandatory statute requiring a town to become a stockholder in a railroad, by exchanging its bonds for stock upon terms prescribed by the statute, and without its consent, is unconstitutional.

By 2 R. S. 587, § 87, it is provided that in case a verdict shall be found for the person suing out an alternative writ of mandamus, a peremptory mandamus shall be granted to him without delay. *Held*, that the relator is not entitled to a peremptory mandamus after verdict in his favor, where the record shows no legal right in respect to matters of fact.

THE proceedings in the case originated in an application by the relator, the Dunkirk, Warren and Pittsburgh Railroad Company, for a mandamus to compel one Parkhurst, defendant's predecessor as supervisor of the town of Stockton, Chautauqua county, to issue bonds of the town, pursuant to an act of the legislature of April 23, 1867, and other acts amendatory and supplementary. An alternative mandamus was issued, and on the return the jury found a verdict for the plaintiffs. A new trial was denied at general term, and judgment was directed on the verdict. The defendant appealed.

John Gansen, for appellant. The substantial question, whether the peremptory mandamus should issue, may be raised at any time before it is awarded. *Com. Bk. of Albany v. Canal Comrs.*, 10 Wend. 25, 31; *People v. Suprs. Dutchess Co.*, 3 How. 379. The acts compelling the town to issue the bonds are unconstitutional. *People v. Chicago*, 51 Ill. 58; S. C., 2 Am. Rep. 278; *Bailey v. Mayor, etc.*, 3 Hill, 531; *Atkins v. Town of Randolph*, 31 Vt. 226; *Oliver v. Worcester*, 102 Mass. 489; S. C., 3 Am. Rep. 485; *West. Sav. Soc. v. Lawrence*, 12 Ill. 1; *Louisville v. Prest, etc.*, 9 B. Mon. 642; *Trustees of Aberdeen v. Female Academy*, 13 S. & M. 645; *Dart. College v. Woodward*, 4 Wheat. 577; *Ferret v. Taylor*, 9 Cranch, 435; *Montpelier v. East Montpelier*, 29 Vt. 12.

E. C. Sprague, for respondents. The peremptory mandamus should have issued. 2 R. S. 587, § 57; *People ex rel. Aspinwall v. Supr's of Richmond*, 28 N. Y. 112, 114; *Topping on Injunct.* 392.

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894; 3 Blk, 265; L. 1859, 422; L. 1854, 592; *Becker v. People*, 18 N. Y. 487; *People v. Bd. Met. Police*, 26 id. 36; *People v. Ransom*, 2 id. 490; *People ex rel. Lumley v. Lewis*, 28 How. 470; *Com. Bk. of Albany v. Canal Comrs.*, 10 Wend. 25; *Fish v. Weatherwax*, 2 Johns. Cas. (2d ed.) 267, note. The acts of the legislature requiring the bonds to be issued are constitutional. *People v. Mayor of Brooklyn*, 4 N. Y. 419, and cases cited; *Town of Guilford v. Supr's Chenango Co.*, 13 id. 143, 145, 146; *Gordon v. Cornes*, 47 id. 608; *Trustees N. Y. P. E. School*, 31 id. 574; *Thompson v. Lee Co.*, 3 Wall. 327; *People v. Mitchell*, 45 Barb. 208; *Litchfield v. Vernon*, 41 N. Y. 123, 133; *People v. Lawrence*, id. 137.

GROVER, J. Section 1, chapter 672, Laws of 1867, enacts that it shall be lawful for the supervisor of any town in the county of Chautauqua, through which the Dunkirk, etc., railroad shall run, or of any town adjoining either of the towns through which said railroad shall run, to borrow, on the faith or credit of such town, any sum of money, not exceeding twenty per cent of the assessed valuation of the real and personal property of such town, as shown by the last assessment roll previous to the issuing of the bonds authorized by the act, at a rate of interest not exceeding seven per cent, and for a period not exceeding thirty years, and to execute bonds therefor; provided that the power and authority conferred shall only be exercised upon the condition that the consent shall first be obtained in writing of a majority of the tax payers of such town owning or representing, etc., more than one-half of the taxable property of said town, assessed and appearing upon the assessment roll of the year last preceding the issuing of the bonds authorized, proved or acknowledged as therein specified; and that such consent shall be procured within three years from the passage of the act. That such consent shall state the amount of money to be raised, and the fact that a majority of the tax payers owning or representing a majority of the taxable property, as appeared from the assessment roll, had been obtained, should be proved by the affidavit of one of the assessors of the town, or that of the town or county clerk, indorsed upon or annexed to such written consent, which should be filed, and have the effect specified in said section.

Section two provides that said supervisor may, in his discretion, dispose of such bonds or any part thereof to such persons and upon such terms, not less than par, as he may deem most advantageous

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to the town; and that the money raised by loan or sale of the bonds shall be invested in the stock of the railroad company; and that the same shall be used in the construction of the railroad, etc.; the public necessity and utility of which was thereby declared; and that in its construction the said towns were immediately interested; and that for the purpose of such construction, the said supervisor, in the name of the town, might subscribe for and purchase the stock of said company to the amount to which the tax payers had consented, as above specified; and that by virtue of such subscription and purchase the town should acquire all the rights and privileges, and incur all the responsibilities as other stockholders of the company. Other sections provide for levying and collecting taxes for the payment of the interest and principal of the bonds to be issued, and other matters not material to the questions in this case.

Between the passage of the above act and before the passage of chapter 472 (volume 1, page 850, Laws of 1868), the town of Stockton was not bonded. By the first section of the last-mentioned act it was provided that, in case the written consent of the tax payers of any town has been or should thereafter be obtained in the manner provided by the first-mentioned act, its supervisor was authorized and required to make a subscription to the stock of the company to the amount fixed in such consent, and to issue the bonds of the town, and dispose of the same as required by said first-mentioned act. Section three of the last act provides that the supervisor of Stockton shall not be required to issue the bonds of that town, although authorized as required by the act of 1867, until the iron was laid upon the road from Dunkirk to the Pennsylvania line.

The following consent of tax payers was introduced in evidence upon trial: "The undersigned, tax payers of the town of Stockton, hereby consent that the supervisor of the town of Stockton may borrow the sum of \$34,000 on the faith and credit of said town, at a rate of interest not exceeding seven per cent, for a term not exceeding thirty years, and execute bonds therefor under his hand and seal; and that the said supervisor may, in his discretion, dispose of such bonds or any part thereof; and that the proceeds of the sale of such bonds shall be invested in the stock of the Dunkirk, etc., railroad company; and that the said supervisor may exercise full and complete powers for said town under the first-mentioned act." This consent was signed by a considerable num-

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ber of tax payers, whose signatures were proved or acknowledged as required by the act, to which was annexed an affidavit of Coyden Putnam, one of the assessors of the town, to the effect "that the persons whose names appear attached to said consent, and which appear on the assessment roll of the town for the year 1867, were a majority of all the tax payers of the town of Stockton whose names appear upon said assessment roll, and that they are a majority of all the tax payers in said town of Stockton whose names appear upon the assessment roll for the year 1867, including resident tax payers, owners of non-resident lands, and including agents representing owners of taxable property; and that each person, so signing said consent, has in due form acknowledged the same or his signature been proved in due form of law." This affidavit was sworn to November 21, 1867; but the papers were not filed in the town clerk's office until April 25, 1868.

No further steps to bond the town appear to have been taken until after the passage of chapter 282, Laws of 1870, volume 1, 634. Section 2 of this act provides that in any case where the written consent authorizing the supervisor of any town to subscribe to the stock of the Dunkirk, etc., railroad company shall have been filed in the town clerk's office of the town, and a copy thereof in the county clerk's office of the county, with the affidavit of one of the assessors of the town, etc., indorsed or annexed to such written consent, and such affidavit shall be based upon the assessment roll of such towns for either of the years 1867, 1868 or 1869, or for the last year previous to the issuing of the bonds as authorized, such affidavit shall be evidence in all courts and for all purposes, and such consent shall authorize, uphold and require the respective subscriptions to be made to such stock, and authorize, uphold and require the issue of bonds to the amount specified in such consent for such towns respectively, and such bonds shall bear date and interest from the respective dates of the first filing of said copy of consent and affidavit in the Chautauqua county clerk's office, and no clerical or other defects in any of such affidavits shall invalidate such proof, or the subscription to the stock or the said bonds. Section three provides that if the said bonds, when issued, shall not be sold for money, as required by the original act, within thirty days from the time when they are ready for sale, the supervisor of the town issuing the same shall deliver said bonds to the railroad company, receiving therefor the par value of the principal

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of said bonds in the stock of the company at its par value. Section four repeals section three of the act of 1868, which provided that the supervisor of Stockton should not be required to issue the bonds of the town until the iron was laid on the road from Dunkirk to the Pennsylvania line. The act of 1867 was a mere enabling act, conferring power upon the several towns embraced therein to issue bonds, upon the conditions therein specified, to aid the construction of the railroad, etc. It conferred no right upon the railroad company or any one else, when proceedings for bonding had been commenced, to have any further steps taken until bonds had been actually issued under the act. Then such rights were acquired. The railroad company could then enforce the application of the proceeds to the construction of its road, according to its provisions, assuming the act to be constitutional. The consent of the tax payers was given under this act. The entire language of the consent shows that the signers understood the act, and their consent in conferring discretionary power upon the supervisor to act upon his views as to the interest of the town. They consent that he may borrow the sum of \$34,000, upon the faith and credit of the town, etc., and execute bonds therefor. That he may, in his discretion, dispose of such bonds, or any part thereof, and invest the proceeds in the stock of the railroad company, and that he may exercise full and complete powers for said town, under the act. Sometimes the word "may" is construed as "shall," but only when the context shows that such was the intention, or when the public have an interest in the exercise of the powers so conferred upon officers or official boards or tribunals. The import of the word, as used in the consent and the act, is to give power, license and permission; not to require or enforce the performance of any one of the specified acts. This view is confirmed by the different language of the acts of 1868 and 1870, relating to the same subject; the latter showing an intention to compel the supervisor to bond the town, and if he failed to sell the bonds at par within thirty days after they were ready for sale he is not only authorized but required to deliver the bonds to the railroad company, upon receipt from it of an amount of stock equal to the principal of such bonds. Under the act of 1867, care was taken that the bonds should not be issued for less than the par value, in cash. This would be the result, whether the money was borrowed upon the faith and credit of the town, and the bonds given as security, or the bonds sold at

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not less than par. Thus there would, in case the town was bonded, be secured for the construction of the road, cash equal to the principal of the bonds. If the bonds are delivered to the company upon the receipt of stock to an amount equal to the principal of the bonds, pursuant to the act of 1870, the bonds become the property of the railroad company, and may be sold upon the market much below par, and thus much less money accrue therefrom for the construction of the road. It is obvious that the consent given does not embrace any such transaction.

Again, the act of 1867 requires that the consent shall be based upon the assessment roll of the year last previous to the issuing of the bonds. This is entirely departed from in the act of 1870. Had there been no subsequent legislation, it is clear that no bonds could have been issued upon the consent given and affidavit made after the completion of the roll of 1868. Had bonds been issued under the provisions of the act of 1867, and the town had complied with its provisions, it would not have been liable to pay a tax at any one time to pay more than one year's interest upon the bonds, as none would have accrued prior to the issue; while the act of 1870 requires in effect that they should bear date and be upon interest from April 25, 1868, the time of filing the consent and affidavit in the town clerk's office, thus subjecting the town to a tax for this back interest, in addition to such as should accrue after the issue. No tax payer of the town has ever consented to any such issue of its bonds. The judgment awards a mandamus to the appellant, compelling him to issue bonds according to the requirements of the act of 1870. If the consent of the tax payers, or any part of them, or of any of the town boards or officers, or any of the electors of the town, is necessary, this judgment cannot be sustained, as no such consent has been given to such an issue of bonds as the judgment commands.

But before examining this question it may be well to consider the point made by the counsel for the respondent: that the appellant having made a return to the alternative writ, and issue having been taken upon such return by the relator, and a verdict having been found in his favor, he is entitled to judgment thereon awarding a peremptory mandamus, together with damages and costs, of course, and therefore the question whether any of the acts in question are constitutional cannot be raised by the appellant either in this or the Supreme Court. 2 R. S. 587, § 57, cited by counsel, provides

that in case a verdict shall be found for the person suing out such writ, or if judgment be given for him upon demurrer or by default, he shall recover damages and costs in like manner as he might have done in an action on the case as aforesaid, and a peremptory mandamus shall be granted to him without delay. The common law providing and regulating the remedy by mandamus, will show that the purpose of enacting this and other provisions of this statute, and that of 9 Anne, chapter 20, was to authorize such pleadings in the proceeding as would present to the court the real merits for adjudication, instead of compelling the relator to resort to an action on the case for the recovery of damages, and to obtain a peremptory writ in case of a false return to the alternative writ. A review of the common law and the reasons for the passage of the statute will be found in the opinion of MARVIN, J., in *The People v. The Supervisors of Richmond Co.*, 28 N. Y. 112. This shows that it was the intention of the statute to do complete justice in the proceeding itself without a resort to any other. *The People v. The Board of Metropolitan Police*, 26 N. Y. 316, was decided upon a point not affecting the present question, and while the opinion of WRIGHT, J., seems to sustain the position of the counsel, he does not place his judgment upon that ground. It could not have been intended by the statute to give a peremptory writ where the record showed no legal right because of a mistake in the return in matters of fact resulting in a verdict for the relator. *The Commercial Bank of Albany v. The Canal Comm'rs*, 10 Wend. 25, gives the true rule : "That at any time after a return, and before a peremptory mandamus is awarded, the defendant may object to a want of sufficient title in the relator to the relief sought or show any other defect of substance, though he cannot, after return, object to defects in form." If the law gave an absolute right to the writ where a verdict was found for the relator, although from the entire record it appeared he had no such right; great injustice might be the result.

This brings us to the question whether a mandatory statute compelling a town or other municipal corporation to become a stockholder in a railroad or other corporation by exchanging its bonds for stock upon the terms prescribed by the statute, without its consent in any way given, is constitutional. This is a different question from that decided by this court in *The Bank of Rome v. The Village of Rome*, 18 N. Y. 38, and in subsequent cases. In

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these the question was, whether enabling statutes conferring power upon such corporations to contract debts with their own consent and investing the money thus raised in the stock of railroad corporations or of exchanging directly its bonds for such stock were valid. These acts were held constitutional by this court, but this does not determine that municipal corporations may be compelled by the mere authority of the legislature to enter into this class of contracts and become such stockholders without their consent and against their will. In *The People v. Flagg*, 46 N. Y. 401, it was held that an act requiring the town of Yonkers without its consent to issue bonds for raising money, which was to be expended in the construction of highways in the town, in the manner prescribed by the act, was constitutional. This was so determined, upon the ground that the making and improving of public highways and providing the means therefor were appropriate subjects of legislation; that towns possess such powers as are conferred by the legislature; that they are a part of the machinery of the State government and perform important municipal functions, subject to the regulation and control of the legislature. In short, that the act was the mere exercise of the unquestioned power of the legislature to determine what highways should be constructed and of the taxing power in providing means to defray the expenses incurred in their construction. But it is said in the opinion that if the object of the expenditure was private, or if the money to be raised was directed to be paid to a private corporation, which is authorized to use the improvement for private gain, the question would be quite different, and in this respect there is a limit beyond which legislative power cannot legitimately be exercised. It is manifest that the question presented in the present case was not determined in that, unless it shall be further held that a railroad owned and controlled by a corporation and operated by it for the benefit of its stockholders is a public highway in the same sense as the common roads of the country. The towns through which the latter run may be compelled to construct and keep them in repair for the common use of the public. The substantial question in the present case is whether they may be so compelled to construct and repair railroads owned and operated by corporations for the benefit of the stockholders. It is clear that they may be, if they are public highways in the same sense as common roads. It has been uniformly held that the right of eminent domain may be exercised so far in behalf of a railroad corpo-

ration as is necessary for the construction and operation of the road upon the ground that the road and its operation was for a public purpose, and therefore the real estate condemned for its use was taken for public and not private use. But it is equally clear that property acquired by the corporation belongs to it exclusively, and its ownership is as absolute as that of any private individual of property belonging to him. It is also clear that so far as the road is operated for the benefit of its stockholders, the corporation is private. We have then an artificial being, created by the legislature, endowed with public franchises, the absolute owner of property of which it cannot be deprived by legislation except for public purposes, carrying on business for the private emolument of its stockholders. *The People v. Flagg* determines that towns may be compelled to provide for the construction and maintenance of improvements of a public character exclusively. But here we have an attempt to compel them to aid in the construction of a work public in some respects, but private in others, of at least equal importance. It is said that municipal corporations are creatures of the legislature and subject to its control. In a certain sense this is true. They are created by the legislature as instrumentalities of the government, and so far as legislation for governmental purposes is concerned are absolutely subject to its control. The powers of legislation over individuals is given to the legislature for all the purposes of government, subject to such restrictions as are contained in the constitution. Yet no one would claim that an individual could be compelled by a statute to exchange his note or bond and mortgage with a railroad corporation for its stock, against his will, upon such terms as were prescribed in the act or any other. It is within the province of legislation to provide for enforcing the performances of contracts when made; but to enforce the making of them by individuals is entirely beyond it. We have seen that municipal corporations may be compelled to enter into contracts for an exclusive public purpose; but I think they cannot be when the purpose is private. This is equally beyond the province of legislation in the case of such corporations as in those of private corporations or individuals. In *Atkins v. The Town of Randolph*, 31 Vt. 226, it was held that an act providing for the appointment of an agent of the town by the county commissioner, with power to purchase liquors on the credit of the town, and to sell the same for certain specified purposes, and account for and pay over the proceeds to the town as

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prescribed, was unconstitutional; and the town, not having consented to the appointment or ratified the contract, was not liable for the liquors purchased upon its credit by such agent pursuant to the act. This judgment is based upon the grounds that the legislative power over municipal corporations is not supreme, and does not include the power of compelling them to enter into contracts of a private character, although such contracts would conduce to the public good by enabling the government to suppress traffic in intoxicating liquors. In the *Western Saving Fund Society of Philadelphia v. The City of Philadelphia*, 31 Penn. 185, it was held that when a municipal corporation engages in things not public in their nature, it acts as a private individual; and in the same case, between the same parties (*id.* 175), it was held that it so acted in supplying its inhabitants with gas. In *Bailey v. The Mayor, etc.*, 3 Hill, 531, it was held that a municipal corporation was to be regarded as private as to its ownership of lands and other property; and that the test whether powers exercised by a municipal corporation were public or private was whether they were for the benefit and emolument of the corporation or for public purposes; and it was further held that the city of New York, under the act to supply the city with pure and wholesome water (Laws 1834, 451) acted as a private corporation, and was responsible as such for the acts of those appointed by the act, for the reason that the corporation had accepted of and consented to the act. Surely a town acts as a private corporation in becoming a stockholder of a railroad corporation, and, as such, interested in the operation of the road for the benefit of the stockholders. When a municipal acts as a private corporation it acts as an individual. In *Taylor v. Porter*, 4 Hill, 140, it was tersely said by BRONSON, J., that the power of making bargains for individuals has not been conferred on any department of the government. In *The People v. Morris*, 13 Wend. 325, the distinction between the nature of the action of public and private corporations is clearly given.

Olcott v. The Board of Supervisors of Fond du Lac, 16 Wallace, 678, recently decided in the Supreme Court of the United States, is cited as decisive of the question now under consideration in the present case. But this question was not in that case. That action was for the recovery of notes and orders issued by the county to the Sheboygan and Fond du Lac Railroad Company, in pursuance of an enabling act passed by the legislature, which required such issue to

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be approved by a majority of the votes given at an election to be held for the purpose of determining whether such majority approved of such issue. The question was whether the enabling act was constitutional. The circuit court held it was not, and gave judgment for the defendant upon the ground that the Supreme Court of Wisconsin had previously so determined, and that, as the question was whether an act of the State legislature was authorized by the constitution of the State, the federal courts must adopt the determination of the State courts. This judgment was reversed by the Supreme Court, the chief justice and Justices DAVIS and MILLER dissenting. Upon the question involved the Supreme Court has no appellate jurisdiction from judgments of the State courts; and, hence, its judgments are not controlling in the determination. I concur in the views of the dissenting justices, that, when the federal courts acquire jurisdiction by reason of the residence of the parties, they ought, in such questions, to follow the determination of the courts of the State. Justice STRONG, in the prevailing opinion, holds that the taxing power can be exercised for public purposes only; but insists that the construction of railroads falls within this class, and that the taxing power may be resorted to therefor. But the exercise of the taxing power, either general or local, for this purpose is altogether different from compelling a town to take stock in a corporation without its consent, and to that extent engage in the business of a common carrier. I think it would not be claimed that a town could be compelled to become a stockholder in a banking or manufacturing corporation, although it appeared that the particular corporation would largely promote the public interest where the business was conducted. Such legislation could only be sustained by holding the power of the legislature supreme over municipal corporations for private as well as public purposes. Upon principle and authority, I think it is not as to the former, although it is as to the latter. The test is, whether the purpose to be effected is public or private; if the former, a mandatory statute is valid. If the latter, it is not within the province of legislation, and consequently not within the power of the legislature, and the act is, therefore, void. We have seen that a railroad corporation possesses some of the characteristics of both; public, as to its franchises; private, as to the ownership of its property and its relations to its stockholders. Were it exclusively public the act of 1870 would be valid, but void if

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exclusely private. It follows that, as the legislature is supreme only as to public purposes, and as the act in question relates in part to private, that to this extent it is void; and as the latter is inseparably connected with the former, the entire act must be held void. In *Sweet v. Hulbert*, 51 Barb. 312, it was held that an enabling act to issue bonds and donate the same or the proceeds to a railroad corporation, to aid in the construction of its road, was void. It is unnecessary to go as far in the present case. It is argued that the power of taxation for any purpose is supreme, and such power may be exercised upon the State at large, or any particular locality, in the discretion of the legislature, and that the act in question is but the mere exercise of this power of taxation, and therefore valid. *The People v. The Mayor of Brooklyn*, 4 N. Y. 419, and *Town of Guilford v. The Supervisors of Chenango*, 13 id. 143, are relied upon to sustain the position. These cases do not go quite as far as claimed by the counsel. The former only determines that an act providing for the expense incurred in grading and improving the streets of a city, by assessments upon the property benefited, is a legitimate exercise of the taxing power, and therefore valid; and the latter, that the legislature can recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude and charity, and provide for their payment by imposing a tax upon those who ought to pay them. The act in question cannot be maintained upon the taxing power. A municipal corporation cannot be compelled to embark in a business of a private character, because its prosecution by it will probably or certainly lead to its taxation for the capital to be invested or expenses incurred therein. The above view renders an examination of the other questions discussed unnecessary.

The judgment appealed from must be reversed, and a judgment rendered declaring the relator not entitled to a peremptory writ, and dismissing the proceedings, with costs to the appellant.

So ordered.

STOKES, plaintiff in error, v. THE PEOPLE.

(53 N. Y. 161.)

Challenge of jurors — constitutionality of statute affecting. Homicide — evidence of threats. Witness. Evidence of another indictment against prisoner. Burden of proof.

The New York Act of 1872 relating to challenge of jurors in criminal cases provides that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror who may have formed or expressed, or has such an opinion or impression, shall declare on oath that he believes that he can render an impartial verdict, and provided that the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict. *Held*, constitutional. The act properly applies to trials of offenses committed before its passage.

On the trial of a prisoner for murder evidence was given making it a question for the jury whether the case was one of excusable homicide on the ground of self-defense, evidence was then offered of violent threats made by the deceased but not communicated to the prisoner. This was excluded. *Held*, error. The evidence was admissible to show whether deceased did in fact attempt to do the prisoner bodily harm.

On a murder trial T. was a material witness for the accused, and on cross-examination for the purpose of impairing her credibility she was asked whether she had not taken things which did not belong to her when she left M., her employer. The prosecution was then allowed to contradict T. in this collateral matter by the testimony of M. *Held*, error.

The minutes of the grand jury, showing that an indictment had been found against the accused, upon the complaint of the deceased, for blackmailing, were received in evidence. *Held*, error, there being no proof to show that the deceased knew of the action of the grand jury. This evidence was not admissible even to show that the accused had been guilty of another crime.

The judge at the trial instructed the jury in effect that the law implied motive and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter, or excusable homicide. *Held*, error, nor was the error cured by a subsequent charge that if the evidence was doubtful, or if the jury entertain reasonable doubts, so that they do not know where the truth lies, the prisoner is entitled to the benefit of that doubt.

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ERROR to the general term of the Supreme Court, first judicial department. Edward S. Stokes, the plaintiff in error, was indicted in the county of New York for the murder of James Fisk, January 6, 1872. The material questions are stated in the opinion. There was a verdict of guilty of murder in the first degree in the court of oyer and terminer. The general term affirmed the judgment and the defendant brought error.

Lyman Tremain, John R. Dos Passos and Cephas Brainerd, for plaintiff in error. It was error for the court to charge the jury that the fact of the killing being conceded, the burden of proof that it was not murder was upon the prisoner. *People v. Wilson*, 4 Park. Cr. 619; *People v. McCann*, 16 N. Y. 66; *Horne v. Hawkins*, 3 Gray, 463; *People v. Robinson*, 2 Park. Cr. 235; Trial of Prof. Webster, 72 N. A. Rev. 178; *Com. v. York*, Hurd's Lead. Cas.; Cooley's Const. Lim., 2d ed., 325, note; 9 Metc. 109; 1 Hale's P. C. 425; 4 Blk. Com. 198; 3 Coke's Ins. 47; 1 Hawk. C. 31, § 3; Foster, 256; 1 East's P. C. 215; 1 Browne's Appx. 22; *Penn v. McFall*, Addis. 257; *Penn v. Lewis*, 1 id. 282, 283; 4 Black. 21, Sharswood's, note 26; *Com. v. O'Hara*, cited in Whart. Dig. 148; 1 Russ. on Crime, 482, note; *Com. v. Gross*, 1 Ash. 281; *Com. v. Crane*, 1 Virg. Case, 10; *Respublica v. Bob.*, 4 Dal. 145; *State v. Turner*, Wright, 20; *Coffee v. State*, 3 Yerg. 283; *Dale v. State*, 10 id. 551; *Dains v. State*, 3 Hump. 439; *Bratton v. State*, 10 id. 103; *Darry v. People*, 2 Park. 606; 10 N. Y. 136; *Fitzgerald v. People*, 37 id. 413; 1 Russ. on Crime, 571; *People v. Sullivan*, 1 Park. 347; *People v. Clark*, 3 Seld. 385; *People v. Sullivan*, id. 396; *People v. Austin*, 1 Park. 154; *People v. Johnson*, id. 291; *Dury v. People*, 10 N. Y. 136; *Maher v. People*, 6 Mich. 217, 218; *People v. Perry*, 8 Abb. (N. S.) 34; 1 Col. Crim. L. 593; *Whitford v. Comm.*, 6 Rand. 725; *Hill's Case*, 2 Gratt. 594; *Kelly v. Comm.*, 1 Grant's Case, 492; Stark. on Ev. 277; 3 Greenl. on Ev., § 29; *People v. Divine*, 1 Edmund's Select Cas., 594; *Wynhamer v. People*, 15 N. Y.; *People v. Enoch*, 14 Wend. 159, 421, 424; *Comm. v. Webster*, 5 Cush. 305; 3 Monthly L. Mag. (N. S.), 1, 13; 2 West. L. J. 487; U. S. Monthly Mag. 497; *N. S. v. Mungs*, 7 (Boston) Monthly L. R. (U. S.) 435, 439; *Comm. v. Gardner*, 11 Gray, 438; 4 Penn. L. J. 156, 157; Whart. on Hom. 460, 461; Whart. Cr. L., § 1084; *Fonts v. State*, 8 Ohio St. (N. S.) 98; Whart. Am.

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Cr. L., 6th ed., § 925, note ; *Dale v. State*, 10 Yerg. 351 ; *Anthony v. State*, 1 Meigs, 265 ; *People v. Wiley*, 3 Hill, 195-212, *et seq.* This error affords abundant ground for a new trial. *Wilson v. Rastatt*, 4 T. R. 753 ; 3 G. & W. on N. T. 774, 800, and cases cited, 775, 768 ; *Benham v. Cary*, 11 Wend. 83 ; *Hastings v. Bangor*, H. P. 18 Me. 436 ; *Troxdale v. State*, 9 Hump. 411 ; *James v. Langdon*, 7 B. Mon. 193 ; *Chrisman v. Gregory*, 4 id. 474 ; 4 Conn. 356 ; *Lamb v. C. and A. R. R. and T. Co.*, 46 N. Y. 279. It was error to admit the minutes of the grand jury in evidence. *Myers v. Malcolm*, 6 Hill, 296, and note ; *Cunliff v. Mayor*, 2 Barb. 104 ; Whart. Am. Cr. L., § 824 ; 1 Greenl., § 461 ; *Real v. People*, 42 N. Y. 281 ; *Warrell v. Parmalee*, 1 id. 519 ; *Baird v. Gillett*, 47 id. 186 ; *Wilson v. Wilson*, 4 Keyes, 413 ; 12 Wend. 41 ; 7 id. 193 ; 21 Barb. 189. It was error to exclude evidence of threats made by the deceased that he would kill the prisoner. *Keener v. State*, 18 Ga. 194 ; *Pritchette v. State*, 22 Ala. 39 ; *Monroe v. State*, 5 Ga. 85 ; *Campbell v. People*, 16 Ill. 17 ; *Cor. v. Com.*, 15 B. Mon. 539 ; *Jewitt v. Banning*, 21 N. Y. 27 ; 1 Greenl. Ev. 102 ; 1 Phil. Ev. 181 ; *Williams v. People*, 54 Ill. The prosecution was bound by the evidence of Jennie Turner on her cross-examination, and could not contradict her. 1 Greenl., § 449, and cases cited ; 5 Wend. 301-305 ; *Lawrence v. Baker*, 16 Pick. 157 ; *Com. v. Buzzell*, 4 Den. 502. The act of May 3, 1872, regulating the qualifications of jurors is unconstitutional. Constitution of N. Y., art. 1, § 6 ; Constitution of U. S., subd. 3, § 2, art. III ; Amendments to Constitution of U. S., art. VI ; *Burr's Case*, 1 Burr's Trial, 387, 415 ; 4 Hargrave's St. Trials, 478 ; Hawk. P. C., ch. 43, B. 2, § 28 ; Bac. Abridg., Juries, E. 5 ; Coke Litt. 155, etc. ; 4 Blk. Com. 353, N. 12, by Christian ; 26 Howell's St. T. 1223 ; *U. S. v. Woods*, 4 Cranch, 484 ; 2 Reeves' Hist. Eng. L. 446 ; 5 Bac. Ab., Jurors, 303 ; *Work v. St. of Ohio*, 2 Ben. & H. Lead. Cr. Cas. 333 ; *People v. Vermilyea*, 7 Cow. 108 ; 6 id. 557 ; *People v. Mather*, 4 Wend. 22 ; *People v. Freeman*, 4 Den. 34 ; *Mann v. Glover*, 2 Green, 195 ; *State v. Benton*, 2 Drs. & B. 196 ; *Irvine v. Kean*, 14 S. & R. 292 ; *Com. v. Lester*, 11 id. 155 ; *People v. Cancemi*, 16 N. Y. 501 ; *People v. Allen*, 43 id. 33 ; *People v. Kennedy*, 2 Park. 317 ; *Baxter v. Putney*, 37 How. 143 ; *Townsend v. Hendricks*, 40 id. 162 ; *Lloyd v. Mourse*, 2 Rawle, 49 ; *Wiggin v. Plumer*, 31 N. H. 272 ; *Blake v. Milspaugh*, 1 J. R. 316 ; *Dunk v. Mosher*, 8 id. 445 ; *Pringle v. Huse*, 1 Cow. 432 ; *People v. Goodwin*, 18 J. R. 200

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Cooley's Const. Lim., 2d ed., 309, 311; *R. v. Gordon*, 1 Leach's O. L. 515; *People v. Bodine*, 1 Den. 304; 3 Blk. Com. 363; 1 Just. 156 b, 157 a; 1 Trials *per pais*, 178; 1 Bish. Crim. R. 772. The prisoner was entitled to trial under the jury law that existed when the alleged crime was committed. 1 Shars. Blk. 91, note 37; Potter's Dwar. on Stat. 162, and cases cited; Cooley's Const. Lim. 63; *Sayer v. Wisner*, 8 Wend. 661; *Fust v. Cabenas*, 18 Abb. 144; *Griswold v. At. Dock Co.*, 21 Barb. 225; *Ely v. Holden*, 15 N. Y. 595; *People v. Camel*, 6 id. 463.

Benjamin K. Phelps, district attorney, and *William Fullerton*, for defendants in error. The jury law of 1872 is constitutional. *Taylor v. Porter*, 4 Hill, 140; *Wynehamer v. People*, 13 N. Y. 446; *Walters v. People*, 32 id. 147, 159; 3 Coke's Lict. 464; Cro. Eliz. 260; *Durell v. Mosher*, 8 J. R. 347; *Freeman v. People*, 4 Den. 9, 34; *Lohman v. People*, 1 Com. 384; *People v. Bodine*, 3 Den. 122; *Comm. v. Webster*, 5 Oush. 295. Proof of threats by deceased that he would kill the prisoner, not claimed to have been communicated to the latter until after the homicide, was properly excluded. *People v. Lamb*, 7 Keyes, 360; *Powell v. State*, 19 Ala. 577; *State v. Gregor*, 21 La. An. 473; Wharton's Am. Cr. L., § 1027.

GROVER, J. Having carefully examined the six pleas in abatement, interposed by the plaintiff in error to the indictment, to which the district attorney demurred, upon which judgment was given sustaining the demurrers, and arrived at the conclusion that there was nothing contained in any of these pleas entitling him to judgment quashing the indictment or to any other relief, we shall not examine whether these proceedings are before this court properly for review upon the certiorari issued and the return made thereto. The same remark is applicable to the seventh plea, upon which an issue of fact was joined by the replication of the district attorney, which was tried before Mr. Justice CARDOZO, upon which he directed a verdict for the people. The testimony disclosed nothing tending to show the invalidity of the indictment, and the plaintiff in error was not injured by the disposition of the matter by the judge.

Whether the questions thus attempted to be raised are reviewable by this court, and, if so, what practice should be adopted in bringing them before the court, are immaterial in the present case.

The plaintiff in error clearly had no right to interpose these pleas a second time, or others of a similar character, and was properly required by the court to plead to the indictment, and, upon his standing mute, the proper course was taken by the court in ordering the plea of not guilty to be entered for him, and proceeding to the trial of the issue thus joined.

The only questions necessary to examine are those of law, arising upon the exceptions taken by the counsel for the accused upon the trial of this issue, and, perhaps, those upon the errors in fact assigned upon the writ of error upon the judgment. Those arising upon the exceptions taken upon the trial will first be considered.

Exceptions were taken to the decisions of the court upon the challenge by the prisoner of several jurors for principal cause. It was not claimed by the counsel of the accused that any error was committed, if chapter 475, volume 1, page 1133, of Laws of 1872, is constitutional. It will be proper first to determine this question, as in case that act be held constitutional and valid, it will be unnecessary to determine whether any error was committed had the law remained at it was at the time of the passage of the act. The position of the counsel for the accused is, that the right of trial by jury is secured to persons accused of felony by the constitution, and that this secures the further right of trial by an impartial jury. We shall assume the correctness of the latter position. Any act of the legislature providing for the trial otherwise than by a common-law jury, composed of twelve men, would be unconstitutional and void, and any act requiring or authorizing such trial by a jury partial and biased against either party would be a violation of one of the essential elements of the jury referred to in and secured by the constitution. The counsel insists that the act in question does compel the accused to be tried by a jury partial and biased against him. That the common law held that having formed or expressed an opinion, conclusively proved a want of impartiality, and for this reason excluded the juror upon a challenge for the principal cause, without inquiry as to whether this would influence his action as a juror. The authorities upon the question were somewhat conflicting, and the object of the statute was to prescribe a definite rule. The act provides that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in

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reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror who may have formed or expressed, or has such an opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. It will be seen that the intention of the act was not to place partial jurors upon the panel, but that great care was taken to prevent such a result. The end sought by the common law was to secure a panel that would impartially hear the evidence and render a verdict thereon uninfluenced by any extraneous considerations whatever. If the person proposed as a juror can and will do this the entire purpose is accomplished. To secure this the statute requires that he shall make oath that he can do this, irrespective of any previous or existing opinion or impression. Not satisfied that this may be safely relied upon, on account of the difficulty of determining by a person having an opinion or impression how far he may be unconsciously influenced thereby, the statute goes further and provides that the court shall be satisfied that the person proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. Surely this latter provision, if rightly and intelligently administered by a competent court, will afford protection to the accused from injury from a partial jury. But the accused has not only this but the further protection in his right, after challenge for principal cause has been overruled, again to challenge for favor, and have this tried and determined, uninfluenced by the decision made by the former challenge. While the constitution secures the right of trial by an impartial jury, the mode of procuring and impaneling such a jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury. The opinion of Chief Justice NICHOLSON, in *Eason v. The State of Tennessee*, is cited in opposition to this view. This opinion was given

upon the constitutionality of a statute of Tennessee upon the same subject, but differing from that in this State. By the Tennessee statute it is provided that the juror shall be competent, if he state on oath, that, upon the law and testimony on trial, he believes he can give the accused a fair and impartial verdict. The statement is made conclusive of the question.

The counsel for the accused further insist, that the offense charged having been perpetrated, if at all, prior to the passage of the act, it is not to be applied in the trial of this case, if held constitutional, but only to cases arising thereafter. This position cannot be sustained. While no *ex post facto* law is valid, this has no application to the rules of evidence or the details of the trial. These may be changed as to prior equally with subsequent offenses.

The counsel for the accused offered to prove that the deceased, a short time before the occurrence, had made violent threats against him, such as that he "would beggar him first and then kill him;" "I go prepared for him all the time; so sure as my name is Jim Fisk I will kill him;" "I would kill him as soon as I would a ferocious dog." This was objected to by the prosecution and rejected by the court, to which the counsel for the accused excepted. In determining the competency of this testimony, it must be borne in mind that evidence had been given making it a question for the jury whether the case was one of excusable homicide upon the ground that the act was perpetrated by the accused in defending himself against an attempt by the deceased to murder or inflict some great bodily injury upon him, and the further question whether it was not perpetrated in resisting an attack made upon him by the deceased from which he had reasonable ground to apprehend a design to murder or inflict upon him some great bodily injury. Evidence of threats made by the deceased, which had been communicated by the accused, was received by the court. Proof of the latter facts was competent, as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when, in the absence of such threats, such acts and motions would cause no such belief. But why admissible upon this ground? For the reason that threats made would show an attempt to execute them probable when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability. But an attempt to execute

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threats is equally probable, when not communicated to the party threatened as when they are so; and when, as in this case, the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter, the latter being admissible only for the reason that the person threatened would the more readily believe himself endangered by the probability of an attempt to execute such threats. Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has, in fact, committed the crime, for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it. Had the deceased, just previous to his going into the hotel where the transaction occurred, declared that he was going there to kill the accused, and that he was prepared to execute this purpose, we think the evidence would have been competent upon the question whether he had in fact made the attempt when that question was litigated. And yet there is in principle no difference between this and the testimony offered and rejected. The difference is only in degree. We are not aware of any decision of the precise question by the courts of this State, but there have been several in accordance with the above views in other States. *Keener v. The State*, 18 Ga. 194; *Pritchett v. State*, 22 Ala. 39; *Campbell v. People*, 16 Ill. 17; *Cornelius v. Commonwealth*, 15 B. Mon. 539. In *Jewett v. Banning*, 21 N. Y. 27, it was held that in an action for an assault and battery, alleged to have been committed by the defendant upon the plaintiff when no witnesses were present, proof of previous ill-will by the defendant against the plaintiff was competent as a circumstance tending to show the commission of the acts charged by the plaintiff. This accords with the view above taken. I think the testimony offered was competent and the exception to its exclusion well taken. The error was one prejudicial to the accused, by depriving him of the right to have competent testimony in his favor considered by the jury, and cannot be overlooked by the court.

Jennie Turner was introduced as a witness by, and gave material testimony for, the accused. With a view to impair the credibility of her testimony, she was asked by the prosecution, upon cross-examination, whether she had not left Mrs. Morse, by whom she

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had been employed, without her knowledge or consent, and whether she did not take things not belonging to her when she left. The prosecution was permitted to prove by Mrs. Morse that her testimony in answer to these questions was untrue, to which the counsel of the accused excepted. This was error. Upon cross-examination the prosecution had the right, for the purpose of impairing the credit of the witness, to ask questions as to those collateral matters, but having asked and obtained answers, must abide by the answers given ; other witnesses could not be called to prove such answers untrue. *Lawrence v. Barker*, 5 Wend. 301 ; *Howard v. City Fire Ins. Co.*, 4 Den. 502. It cannot be said that the accused sustained no injury from this. The direct tendency of the incompetent testimony was to impair the credit given to the testimony of his witness.

We think the minutes of the grand jury, showing that an indictment had been ordered by that body against the accused upon the complaint of Fisk for blackmailing, were improperly received. There was no proof tending to show that the prisoner had any knowledge of any such action by the grand jury. The evidence had, therefore, no tendency to show a motive of the prisoner for the killing of the deceased. The prisoner had testified that he knew Fisk had been trying to get him indicted for, as he understood, a conspiracy with another to blackmail him, but that, as he understood, he had failed to procure one. The prosecution could not give evidence tending to show that the prisoner had been guilty of any other crime than the one for which he was upon trial. The only effect of the minutes that I can see was to satisfy the jury that there was evidence of his having committed some other crime of such cogency as to induce the grand jury to indict him therefor. The prosecution had no right to give such evidence. Had the prisoner known of the action of the grand jury, it would have been competent to show a motive for killing the deceased, and, being proper for any purpose, there would have been no error in receiving it.

Numerous other exceptions were taken by the counsel for the prisoner upon the trial to the rulings of the court upon the admissibility of evidence. We have examined these, and arrive at the conclusion that none of them require discussion.

Near the conclusion the judge charged the jury as follows: "The fact of the killing in this case being substantially conceded, it

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becomes the duty of the prisoner here to satisfy you that it was not murder, which the law would imply from the fact of killing under the circumstances, in the absence of explanation that it was manslaughter in the third degree or justifiable homicide ; because, as I have said, the fact of killing being conceded, and the law implying motive from the circumstances of the case, the prosecutor's case is fully and entirely made out, and therefore you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justifiable under the circumstances of the case." To this portion of the charge the counsel for the prisoner excepted. We have examined this portion of the charge to determine whether the idea intended to be conveyed to the jury, and which they would derive therefrom, was that the law implied that the act of killing was murder when perpetrated under the circumstances of the present case, or whether such was the legal implication from the proof of killing, in the absence of proof of the circumstances of its perpetration, by which the case of the prosecution was fully and entirely made out, unless the prisoner had satisfied them that it was not murder which the law would imply from the fact of killing. We think a careful examination of the entire portion of the charge excepted to will show that the latter was the idea intended to be conveyed, and that the jury must have so understood it. From the opinions delivered it was so understood by the justices of the Supreme Court at general term. This view is confirmed by the fact that the circumstances attending the killing in the present case were controverted questions, to be determined by the jury from evidence more or less conflicting ; as claimed by the prosecution, such as would fully authorize a finding by the jury of all the facts constituting the crime of murder in the first degree ; as claimed by the prisoner, such as would authorize the jury to find the homicide excusable. It can hardly be supposed that, under such proof as to what the circumstances really were, the judge intended to charge the jury that the law implied the crime of murder from proof of killing under the circumstances of the case, and upon such proof such an instruction would have been erroneous. The instruction in effect was, and the jury must so have understood it, that the law implied motive, and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them

that it was manslaughter or excusable homicide. This is further confirmed by what immediately follows the portion of the charge excepted to. The judge proceeds to instruct the jury as follows: "Ordinarily, naturally and properly, in cases of this kind, juries are disposed to and should give the prisoner the benefit of any reasonable doubt that may exist in the case, and I do not know that even this is an exception to that rule. If the evidence shall be doubtful upon that subject, if you shall entertain reasonable doubts, if the evidence is evenly balanced, so you do not know where the truth lies, the prisoner would be entitled to the benefit of that doubt." But for the idea conveyed by the part of the charge excepted to, that the law implied the crime of murder in the first degree from the proof of killing only, unless the prisoner satisfied them it was not murder, the benefit of the doubt to be given to the prisoner would not have been restricted to their finding the evidence evenly balanced, so that they did not know where the truth lay; on the contrary, the instruction would have been not to convict of that crime unless convinced by all the evidence in the case that he was guilty, and that if a careful examination of all the evidence left in their minds reasonable doubts of his guilt, they should give the prisoner the benefit by an acquittal. This instruction was warranted by the common law of England. 1 Hale's P. C. 445; 1 East's P. C. 34; 3 M. & S. 15; *Regina v. Chapman*, 2 Eng. R. 160; 12 Cox's Crim. Cases, 4; *Commonwealth v. York*, 9 Metc. 93. As thus construed, the portion of the charge excepted to is obviously in contravention of principle and the analogies of the law. It is a maxim in the law that innocence is presumed until the contrary is proved. How is guilt established by proof only of one of the ingredients essential to constitute crime? To constitute crime there must not only be the act, but also the criminal intention, and these must concur, the latter being equally essential with the former. *Actus non reum facit, sed mens*, is a maxim of the common law. The intention may be inferred from the act, but this, in principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court. But the question in this case is not what was the rule of the common law as to the implication of malice from the act, whether such rule is deduced from authority or principle and legal analogies. The question arises upon the statute of the State by which homicide is made justifiable or excusable, mur-

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der in the first or second degree, or manslaughter in one of four degrees, determinable by the intention and circumstances of its perpetration. Under the statute, it is obvious that mere proof that one has been deprived of life by the act of another utterly fails to show the class of the homicide under the statute.

Section 3 of title 2 of the statute declares in what cases the homicide, when perpetrated by an individual, shall be justifiable. Section 2 of title 1, as amended by the act of 1862, provides that such killing, unless it be manslaughter, excusable or justifiable homicide, shall be murder in the first degree in the following cases: *First*. When perpetrated from a premeditated design to effect the death of the person killed or of any human being. It was under this provision that the prosecution sought to convict the prisoner. To justify such conviction it was necessary for the prosecution to prove all the facts bringing the case of the prisoner within it. Mere proof of the killing did not, as a legal implication, show this. It might still be murder in the second degree, manslaughter in some degree, or justifiable or excusable homicide, consistent with such proof.

It was error to instruct the jury that the law implied all these facts from the proof of the killing. The correctness of this has rarely been questioned since the enactment of the statute. Hence there has been but little said by the courts upon the question, but what has been said sustains it. *People v. Clark*, 7 N. Y. 393; *Fitzgerrold v. People*, 37 id. 418; *People v. White*, 24 Wend. 520; *Wilson v. People*, 4 Parker, 619. The general term was correct in the conclusion that this part of the charge was erroneous, and in the further conclusion that to obviate the error it was for the people to show that the prisoner was not prejudiced by such error. *Greene v. White*, 37 N. Y. 405; *Clarke v. Dutcher*, 9 Cow. 674; *People v. Wiley*, 3 Hill, 194. We have examined the entire charge to determine whether it does so show. We find that the judge correctly charged the jury as to the facts necessary to constitute the crime of murder in the first degree, and, further, that he correctly instructed them that the people must prove all these facts to authorize the jury to render a verdict convicting him of that crime. But how does this cure the error of the instruction that the law implied all the necessary additional facts from the proof of the killing? It was in effect instructing the jury that although the people must prove all these facts, yet they had done so by proving

the killing, and by that the case of the prosecution was fully and entirely made out, and that this proof made it the duty of the prisoner to satisfy them that it was not murder which the law would imply from that proof; thus, in effect instructing the jury that the proof of the killing cast the burden of proof upon the prisoner to show that it was not murder but manslaughter, or justifiable homicide. No such burden of proof was, by that, cast upon the prisoner. *Lamb v. Camden, etc., R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327. The further instruction to the jury, to the effect that the law required no particular length of time between forming the design to kill and the act by which the death was effected, had no relation to or bearing upon the point in question; the jury may, as matter of fact, find the design to kill from the act by which death was effected; and all facts, except that of the killing itself, required to constitute murder in the first degree, by proof of circumstances which convince them of the truth of such facts. They are to pass upon the whole case, inferring facts from the proof of other facts which convince their judgment of the truth of the facts inferred, bearing in mind that the burden of proof is upon the prosecution as to all the facts necessary to constitute guilt during the entire trial, and that their verdict should be the conscientious expression of their convictions derived from all the evidence.

It is unnecessary to pass upon any of the questions arising upon the offer of the plaintiff in error to assign error in fact upon the judgment. As to these we will simply remark that we think they were properly disposed of upon the motion for a new trial.

But for errors in rejecting competent evidence offered by the prisoner and in receiving incompetent evidence against him, and in the part of the charge excepted to, the judgment must be reversed and a new trial ordered.

RAPALLO, J. I am satisfied that the conviction in this case cannot be sustained without the violation of settled principles of law, and it necessarily follows that I must vote for a reversal. While concurring in the reasons assigned by my learned associate for coming to the same conclusion, I will briefly state the considerations which to me seem controlling, independently of the numerous other points which have been discussed.

It is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor; and that if upon the whole

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evidence, including that of the defense as well as the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence of the guilt of the accused; and it is clear error to charge them, when the prosecution has made out a *prima facie* case and evidence has been introduced tending to show a defense, that they must convict, unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner and subjects him to conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury as to his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are fully satisfied that he has proved his innocence.

The charge in this case was in my judgment calculated to convey to the jury that erroneous rule for their guidance. They were virtually instructed that, the killing being conceded, they should convict of the crime of murder, unless the proofs adduced by the prisoner satisfied them that the circumstances under which the killing took place were such as to justify his act, or reduce the grade of his offense. Though upon the whole evidence they might be in doubt as to what the circumstances really were, the killing being conceded, this charge indicated that it was their duty to convict.

The language of the charge to which exception was taken is as follows: "The fact of killing in this case being substantially conceded, it becomes the duty of the prisoner here to *satisfy you* that it was *not murder*, which the law would imply from the fact of the killing under the circumstances, in the absence of explanation that it was manslaughter in the third degree or justifiable homicide; because, as I have said, the fact of killing being conceded, and the law implying malice from the circumstances of the case, the prosecution's case is fully and entirely made out; *and therefore you can have no reasonable doubt as to that*, unless the prisoner shall give evidence *sufficient to satisfy you* that it was *justifiable* under the circumstances of the case."

Argument seems unnecessary to demonstrate the error of this charge. It was a necessary part of the case of the prosecution to establish that the homicide was perpetrated with a premeditated design to effect the death of the person killed; yet the court, assum-

ing to determine what the circumstances of the killing were, solemnly instructed the jury that the fact of killing being conceded, the law implied malice from the circumstances of the case, and that the case on the part of the prosecution was fully made out, and that the *jury could have no reasonable doubt as to that* unless the evidence on the part of the prisoner *satisfied them* that the killing was justifiable. The Supreme Court, in sustaining the judgment of the court of oyer and terminer, do not attempt to defend the legality of this charge. On the contrary, the very able opinion of FANCHER, J., conclusively demonstrates upon authority that it is at variance with numerous adjudications and the settled law upon the subject. But it is claimed that the error may be overlooked on the ground that the prisoner was not prejudiced thereby, and cases are cited which decide that where it appears to the appellate court that error has been committed, yet that the error could not possibly have prejudiced the party complaining, it will not be made a ground of reversal either in civil or criminal cases.

In all these cases it will be found that the court has been exceedingly careful so to limit this rule as to render it applicable only where by no possibility could the error have produced injury, and even this was an innovation upon ancient rules, under which it was a matter of course to reverse when error appeared, without inquiring into its materiality.

That so vital an error as one which should or might mislead the jury on the question as to the party on whom the burden of proof rested, could come within the category of those which could not possibly prejudice the determination of the case, is utterly inadmissible. Nothing short of an unequivocal retraction of that portion of the charge could have removed from the minds of the jury the impression which it was calculated to produce. It was the concluding portion of the charge, and afforded the jury a simple rule for their guidance in their consultation. The fact of killing was, as they were told, *conceded*. They were further told that it was the duty of the prisoner to satisfy them that this killing was not murder. That the law implying malice from the circumstances of the case, the prosecution's case was fully and entirely made out, and therefore they could have no reasonable doubt as to that, unless the evidence on the part of the prisoner *satisfied them* that it was justifiable under the circumstances. Their inquiry was thus reduced to whether they were *satisfied* of the truth of the allegations on the

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part of the defense. If they were in doubt whether these were true or not, they were bound to convict.

It seems to have struck the mind of the learned judge at the time, that the rule thus laid down by him encroached somewhat upon the principle that the prisoner was entitled to the benefit of a reasonable doubt, and he immediately followed by stating that, ordinarily, juries should give the prisoner the benefit of any doubt that may exist in the case, and that he did not know that even this was an exception to that rule, and he proceeded to instruct them generally upon the subject of reasonable doubts.

It is impossible that we should know whether these instructions effectually eradicated from the minds of the jury the erroneous impression calculated to be produced by the previous portion of the charge, and we cannot, therefore, pronounce, as a conclusion of law, that it had no influence upon the verdict.

Whether under a proper charge the jury would have come to the same result it is not within our province to decide. The determination of the facts rests wholly with the jury. It is for the court to instruct them as to the law, and these instructions they are bound to follow. If materially erroneous, it is the imperative duty of the appellate tribunal to grant a new trial.

All concur.

CHURCH, Ch. J., and ALLEN, J., expressing no opinion as to the constitutionality of the act, chapter 475, Laws of 1872.

Judgment reversed and new trial ordered.

BAKER V. DRAKE, appellant.

(68 N. Y. 211.)

Measure of damages for conversion of stock

Defendants as brokers bought stock for plaintiff, which they were to hold subject to plaintiff's order. Plaintiff deposited a "margin" with defendants but otherwise paid nothing for the stock. In an action for an unauthorized sale the judge charged the jury that plaintiff was entitled to recover the difference between the amount for which the stock was sold and the highest market value which it reached at any time after the sale and down to the day of trial. *Held*, error. It seems that the advance in the market price of the

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stock from the time of the sale up to a reasonable time to replace it, after plaintiff received notice of the sale, is the true measure of damages. (Overruling *Markham v. Jaudon*, 41 N. Y. 235.)*

ACTION to recover damages for the alleged unauthorized sale by defendants of 500 shares of stock of the Chicago & Alton Railroad Company. The plaintiff obtained a verdict. Judgment thereon was affirmed at general term and the defendants appealed to this court. The opinion states the case.

James C. Carter, for appellants, cited *Scott v. Rogers*, 81 N. Y. 676, 679; *Suydam v. Jenkins*, 3 Sand. (S. O.) 614; *Brass v. Worth*, 40 Barb. 648; Sedgw. on Dam., 4th ed., 554, note.

James Emott, for respondent, cited *Markham v. Jaudon*, 41 N. Y. 235; *Fisher v. Prince*, 3 Burr. 1363; *Whitten v. Fuller*, 2 Wm. Blk. 902; *Shepherd v. Johnson*, 2 East, 211; *Shaw v. Holland*, 15 M. & W. 136; *McArthur v. Ld. Seaforth*, 2 Taunt. 257; *Greening v. Wilkinson*, 1 O. & P. 625; *Forrest v. Elwes*, 4 Ves. 493; *Owen v. Routh*, 14 C. B. 327; *Bk. Montgomery v. Reese*, 26 Penn. St. 143; *Weymouth v. Chic. and N. W. R.*, 17 Wis. 550; *Cannon v. Folsom*, 2 Iowa, 101; *Douglass v. Kraft*, 9 Cal. 562; *Kid v. Mitchell*, 1 N. & McC. 334; *Ewing v. Blount*, 20 Ala. 694; *Cortelyou v. Lansing*, 2 Cai. Cas. 200; *Hart v. Ten Eyck*, 2 Johns. Oh. 62; *West v. Beach*, 8 Cow. 82; *Clark v. Pinney*, 7 id. 681; *Kortright v. Com. Bk. Buffalo*, 20 Wend. 91; S. O. in error, 22 id. 348; *Wilson v. Little*, 2 Comst. 443; *Dana v. Fiedler*, 2 Kern. 40; *Romaine v. Van Allen*, 26 N. Y. 309; *Scott v. Rogers*, 31 id. 676; *Burt v. Dutcher*, 34 id. 493.

RAPALLO, J. The most important question in this case is that which relates to the rule of damages. The judge at the trial, following the case of *Markham v. Jaudon*, 41 N. Y. 235, instructed the jury that the plaintiff, if entitled to recover, was entitled to the difference between the amount for which the stock was sold by the defendants and the highest market value which it reached at any time after such sale down to the day of trial.

This rule of damages has been recognized and adopted in several late adjudications in this State in actions for the conversion of

* See *Sturges v. Keith*, 11 Am. Rep. 28.

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property of fluctuating value ; but its soundness, as a general rule, applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other States.

This court has, in several instances, intimated a willingness to re-examine the subject, and in *Mathews v. Coe*, 49 N. Y. 57, per CHURCH, Ch. J., stated very distinctly that an unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, could not be upheld upon any sound principle of reason or justice, and that we did not regard the rule referred to so firmly settled by authority as to be beyond the reach of review, whenever an occasion should render it necessary.

Whether the present action is one for the conversion of property of the plaintiff, or for the breach of a special contract, presents a serious question, but that inquiry is perhaps unimportant on the question of damages and will be deferred for the present, and the case treated as if it were one of conversion.

Regarding it in that light, the question is whether or not, under the circumstances of the case, the rule adopted by the court below affords the plaintiff more than a just indemnity for the loss he sustained by the sale of the stock. It is not pretended that the defendants realized any profit by the transaction, and therefore the inquiry is confined to the loss sustained by the plaintiff.

It does not appear that there was any express contract made between the parties, defining the terms upon which the defendants were to purchase or carry stocks for the plaintiff. All that appears upon that subject in the evidence is, that the plaintiff, through his friend Rogers, deposited various sums of money with the defendants, and from time to time directed them to purchase for his account shares of stock to an amount of cost from ten to twenty times greater than the sums deposited ; which they did. No agreement as to margin or as to the carrying of the stock by the defendants is shown by the evidence, but the plaintiff alleges in his complaint that the agreement was that he should deposit with the defendants such collateral security or margin as they should from time to time require ; and that they would purchase the stock and hold and carry the same, subject to the plaintiff's direction as to the sale and disposition thereof, as long as the plaintiff should desire, and would not sell or dispose of the same unless plaintiff's margin should be exhausted or insufficient, and not then, unless

they should demand of the plaintiff increased security, or require him to take and pay for the stocks, and give him due notice of the time and place of sale, and due opportunity to make good his margin.

The answer denies only the agreement to give notice of the time and place of sale, admitting by implication that in other respects the agreement is correctly set forth.

This is all that appears upon the record in reference to the contract under which the stocks were purchased.

The transactions under this contract appear in detail by a final account rendered by the defendants to the plaintiff, after the stock had been sold. This account was upon the trial admitted to be correct, the plaintiff reserving the right only to dispute certain charges of interest, which, however, if successfully assailed, would not vary the result to an extent sufficient to affect the reasoning based upon it.

From this account it appears that the plaintiff had, during the whole course of his transaction with the defendants, advanced in the aggregate but \$4,240 toward the purchase of shares, which at the time of the alleged wrongful sale, November 14, 1868, had cost the defendants upward of \$66,300 over and above all the sums so advanced by the plaintiff.

By the stock lists in evidence it appears that these shares were then of the market value of less than \$67,000, and the surplus arising from the sale, after paying the amount due the defendants, amounted to only \$558, which sum represents the value at that time of the plaintiff's interest in the property sold.

It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of this action, November 24, 1868, the shares would have brought some \$5,500 more than the sum for which they had been sold. But after the commencement of the action, and before the trial, the stock underwent alternate elevation and depression, and reached its maximum point in August, 1869, at which time one sale, of thirty shares at 170 per cent, was proved. It afterward declined, and on the day preceding the trial, October 20, 1869, the price was 143, having, for a month previous to the trial, ranged between 137 and 145.

The jury, in obedience to the rule laid down by the court, found a verdict for the plaintiff for \$18,000, being just the difference

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between 134, which was the average price at which the defendants sold, and 170, the highest price touched before the trial; thirty-six per cent on 500 shares. More than two-thirds of this supposed damage arose after the bringing of the suit.

This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could possibly have been derived from the transaction by one endowed with the supernatural power of prescience.

In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in further loss as in profit, to lay down as an inflexible rule of law that as damages for its wrongful interruption the largest amount of profits which subsequent developments disclose might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded.

An amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of complainant would not have averted, is the measure of damages which juries are usually instructed to award, except in cases where punitive damages are allowable. Before referring to the authorities which are supposed to govern the question, I will briefly suggest what would be a proper indemnity to the injured party in a case like the present, and how greatly the rule under consideration exceeds that just limit.

The plaintiff did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit

by their sale. He had not paid for them. The defendants had supplied all the capital embarked in the speculation, except the comparatively trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline, or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss.

If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had a right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale; would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? If the stocks had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract, or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done.

But the rule adopted in *Markham v. Jaudon*, passing far beyond the scope of a reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him, with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar and the more new trials granted in

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the action, the better for him. He is freed from the trouble of keeping his margins good and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless he can incur no loss, but if, at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a retrospect and seize upon that happy instant as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss.

No reasons are given, in the prevailing opinion in *Markham v. Jaudon*, in support of the rule of damages there laid down. All that is said upon the subject is, that the action is for the conversion of the stock, and that the rule of damages was correctly laid down by the court at the trial. And the cases of *Romaine v. Van Allen*, 26 N. Y. 309; *Scott v. Rogers*, 31 id. 676, and *Burt v. Dutcher*, 34 id. 493, are cited as establishing that proposition. It will be well to refer for a moment to those cases, which are the only ones referred to by the court in *Markham v. Jaudon* on the question of damages.

Romaine v. Van Allen was an action for the wrongful conversion, by a bank, of shares of stock actually owned by the plaintiff and deposited by him with the bank as security for a loan of money for which the plaintiff had given his personal obligation, with authority to sell the shares only in case the plaintiff should, on demand, fail to repay the loan. It did not appear that the shares were held for speculative purposes, but it was justly inferable, from the circumstances, that they were held for investment, and would have been retained by the plaintiff but for the wrongful sale. The bank sold the shares without any notice or demand of payment. On being informed of the sale, the plaintiff promptly refused to ratify it, and required the bank to replace the shares. Pending negotiations with that view the bank failed, and the defendant was appointed receiver. The plaintiff presented his claim to the receiver, demanding the highest price which the stock had reached up to the time of the claim, and giving notice that, if compelled to resort to an action, he should claim the highest price down to the time of trial. The trial was had before a referee, and consumed from October 25, 1861, to July 25, 1862, a period of nine months. The stock reached its

highest point on the 30th of June, 1862, and the price on that day was adopted in measuring the damages.

Remarks upon this case will be deferred until the others have been stated.

The next case cited is the later one of *Scott v. Rogers*, 31 N. Y. 676, in which a different rule was sanctioned. In that case a sale of wheat by an agent was held to have been in violation of the instructions of his principal, and the agent was determined to be liable as for a conversion of the wheat. The action was not brought until more than four years after the alleged conversion, during which period there had been great fluctuations in the market price of the article. That case was twice argued, the court on the first argument being equally divided. The rule of damages finally adopted was that the plaintiff should be allowed the highest market price which the property reached between the time of the conversion and a reasonable time thereafter to commence the action, and under the special circumstances of that case a finding that a period of about four months was such reasonable time was sustained. This rule necessarily limits the range of prices to a period prior to the commencement of the action, if brought within a reasonable time, and, if unreasonably delayed, then to the period within which it should have been brought, and, in either case, excludes prices prevailing after the commencement of the action. But it may be justly said that the question whether the prices prevailing after the commencement of the action could be considered was not directly involved in the judgment in *Scott v. Rogers*, as the judgment of the court below in that case limited the inquiry to a reasonable time within which to commence the action, and this court merely affirmed that judgment, which it might have done even had it thought the rule too favorable to the defendant, who was the only appellant.

Though the rule sanctioned in *Scott v. Rogers* materially differs from that adopted in *Romaine v. Van Allen*, the case of later date cannot be regarded as overruling the earlier.

Burt v. Dutcher, 34 N. Y. 493, was an action for tortiously taking and converting hops belonging to the plaintiff, and the measure of damages was held to be the highest market price of the hops between the time of the taking and that of the trial. The amount dependent upon the rule of damages was very insignificant; the question was not discussed, but treated as definitely determined

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by the cases of *Romaine v. Van Allen* and *Scott v. Rogers*. This case adds no force to those decisions, but is dependent upon them. *Scott v. Rogers*, as has been shown, is not an authority in favor of the rule under consideration. *Romaine v. Van Allen* is the only one referred to in *Markham v. Jaudon* which gives substantial support to the conclusion there reached. The authorities upon which the decision in *Romaine v. Van Allen* was based should, therefore, be examined. The first case referred to is *Cortelyou v. Lansing*, 2 Caines' Cases in Error, 200. That was an action of assumpsit for the value of a certificate of public debt, of the nominal value of \$2,600, which had been pledged, under a written contract to restore it on repayment of a loan of \$600 and interest, and had been unlawfully sold by the pledgor without demand or notice. The rule of damages adopted was the value of the certificate at the time at which the plaintiff demanded its restoration.

It may be as well to remark here as anywhere, that the rule of damages should not depend upon the form of the action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort; except in those special cases where punitive damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy. Chancellor KENT, in delivering the opinion of the court of errors (*Cortelyou v. Lansing*), though the action was in assumpsit, seeks the rule of damages in the principle applicable to an action for conversion. He says: "The value of the chattel, at the time of its conversion, is not in all cases the rule of damages in trover. If the thing be of a determinate and fixed value, it may be the rule, but when there is an uncertainty or fluctuation attending the value, and the chattel afterward rises in value, the plaintiff can only be indemnified by giving him the price of it at the time he calls upon the defendant to restore it; and one of the cases even carries the value down to the trial." The case which Chancellor KENT here refers to is that of *Shepherd v. Johnson*, 2 East, 211, and it is principally from a misapplication, if not misapprehension, in later opinions, of what was decided in that case, and in those of *McArthur v. Seaforth*, 2 Taunt. 257, and *Harrison v. Harrison*, 1 Carr. & P. 412, which followed it, that the

doctrine of allowing the highest price at any time down to the day of trial has arisen.

Those three cases were all actions of debt on bonds conditioned for the return of government stocks loaned. It was assumed that the lender had them for investment. The rate of damages allowed was the price at the time of the trial, which was higher than that at the time the stock ought to have been returned; but there is nothing in these cases sanctioning the allowance of any higher price which might have prevailed at any intermediate day. The ground upon which the price at the time of trial was allowed, was that the plaintiff should be placed in the same situation in which he would have been had the stock been replaced at the stipulated time, and that the court would not act upon the possibility of his not keeping it, but upon the presumption that he would have retained it till the day of trial, and hence its price at that time was the proper indemnity.

This rule necessarily excludes any hypothetical damage based upon the supposed loss of an opportunity to sell the stock at an intermediate time. A claim for a similar loss was made in one of the cases cited (*McArthur v. Seaforth*), where, had the stock been replaced in the proper time, the plaintiff might have availed himself of an option given by the government, of exchanging it for other stock which at the time of trial was of greater value than the stock loaned. But this claim was rejected, it not having been shown to be probable that the plaintiff would have made the exchange. *Greening v. Wilkinson*, 1 C. & P. 625, also cited in *Romaine v. Van Allen*, is a brief *nisi prius* decision of ABBOTT, Ch. J., in an action for the conversion of cotton warrants, in which he says that the amount of damages is *for the jury*, who *may* give the value at the time of the conversion or at any subsequent time *in their discretion*, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. This is the nearest approach to an authority in favor of *Romaine v. Van Allen* to be found in any of the English authorities cited, and although but a *nisi prius* decision, is entitled to great respect on account of the eminence of the judge who pronounced it. Still it falls short of sanctioning the doctrine that as a fixed rule the plaintiff is absolutely entitled to recover the highest price prevailing at any time before the end of the trial, without any evidence showing that it was even probable that he would have realized such

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price. Far from laying down any such rule, ABBOTT, Ch. J., says that the amount of damages is for the jury, who *may in their discretion* allow the value at a subsequent time to indemnify against the loss of an opportunity of selling. It is to be supposed that in the exercise of this discretion the jury are to be governed by the evidence, and that they must be satisfied that the plaintiff would have made the sale had the goods not been detained.

In *Kortright v. The Commercial Bank of Buffalo*, 20 Wend. 91, the action was assumpsit for refusing to allow a transfer of shares of bank stock upon which the plaintiff had advanced money. The measure of damages adopted was the highest price between the refusal and the commencement of the suit. This was affirmed by the court of errors (22 Wend. 348), Senator VERPLANCK going further than the court below, and expressing the opinion that the defendant was liable for the highest price before the trial; citing *West v. Wentworth*, 3 Cow. 82, and *Clark v. Pinney*, 7 id. 596.

These were actions for the non-delivery of merchandise in pursuance of a contract of sale, and the extreme rule was applied of allowing to the vendee, as damages, the highest value up to the time of trial. This rule was, however, strictly confined to cases where the purchase price had been paid in advance, it being conceded that in the ordinary case where the price was to be paid on delivery, the only rule is the market value on the day appointed by the contract for their delivery. It cannot be disputed that this distinction, though questioned by high authority, has long been acted upon in this State in respect to contracts for the sale and delivery of goods. The reason upon which it is founded is that, where the purchaser has not paid for the goods, he may, on the refusal of his vendee to deliver, go into the market and buy goods of a similar quality, and that what it would cost him to do this is the just measure of his damages; but that where he has paid the purchase-money, it is unreasonable to require him to pay it a second time, and therefore all fluctuations in price should be at the risk of the vendor who refuses to deliver, while retaining the purchase-money. The very reasoning upon which these decisions are founded demonstrates their applicability to a case like the present, where the purchase-money of the stocks has not been paid by the complaining party, and the only additional payment which he would be required to make for the purpose of replacing the stocks would be such as was occasioned by the rise in the market price.

The case of *Allen v. Dykers*, 3 Hill, 593; affirmed, 7 id. 497, is also referred to in *Romaine v. Van Allen*. Shares of stock had been deposited with the defendants as collateral security for a loan, for which a note on time was given, containing authority to sell the stock on non-payment of the note at maturity. The defendants sold a portion of the stock before the maturity of the note, and the plaintiff brought his action to recover the difference between the value of the stock and the amount of the note. There was evidence, consisting of a book kept by defendants, that they had been dealers in the stock and had realized \$99.50 per share for some of it, which they had sold in the interim, and damages were awarded at that rate. In the Supreme Court the question of damages was not discussed. All that there appears upon the subject is in the opinion of NELSON, Ch. J., who says that he does not perceive any ground for interfering with the verdict because of the rule of damages adopted by the circuit judge, and in the Court of Errors the question of damages is not adverted to. Not much aid is to be derived from that case.

The most thorough consideration of the subject to be found in any reported case is contained in the extremely able opinion of DUBB, J., in *Suydam v. Jenkins*, 3 Sandf. Sup. Court Reports, 619 to 647, where that accomplished jurist reviews, with great discrimination, many of the cases here referred to, and others which have not been cited, and arrives substantially at the same conclusion as that reached by CHURCH, Ch. J., in *Matthews v. Coe*, 49 N. Y., that the highest price which the property has borne at any time between its conversion and the trial cannot in all cases be the just measure of damages. The reasoning contained in that opinion is of such force as to outweigh the apparent preponderance of authority in favor of the rule claimed, and demonstrates its fallacy when applied to the facts of the present case, whether the cause of action be deemed for conversion of property or the breach of a contract.

When we consider the opposition which this rule has constantly encountered in the courts, the variety of the judgments in the cases in which it has been invoked, and the doubting manner in which it has been referred to by eminent jurists, whose decisions are cited in its support, it cannot be regarded as one of those settled rules to which the principle of *stare decisis* should apply. See *Starbuck v. Cortazzi*, 2 Or., Mees & Rosc. 165; 2 Kent's Com. 637, 11th ed., note, *Owen v. Routh*, 14 C. B. 327; *Williams v. Archer*, 5 Man., Gr. &

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Scott, 318; *Archer v. Williams*, 2 Car. & Kir. 26; *Rand v. White Mountains R. R. Co.*, 40 N. H. 79; *Brass v. Worth*, 40 Barb. 648; *Pinkerton v. Manchester R. R.*, 42 N. H. 424; 45 id. 545, and the able review of the subject in Sedgwick on Damages, 550 to 555, note, 5th ed.

It seems to me, after as full an examination of the subject as circumstances have permitted, that the dissenting opinions of GROVER and WOODRUFF, JJ., in *Markham v. Jaudon*, embody the sounder reasons, and that the rule of damages laid down in that case and followed in the present one is not well founded, and should not be sustained.

For this reason, without passing upon the other questions involved in the case, I think the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

HUBBELL, appellant, v. MOULSON *et al.*

(33 N. Y. 235.)

Mortgage — mortgages in possession. Rents and profits. When ejectment will not lie against mortgagees.

In an action of ejectment by the grantee of a mortgagor against the grantee of a mortgagee, plaintiff offered evidence to show that the mortgage debt had been paid by the receipt by the mortgagee while in the possession of the land, of rents and profits sufficient to satisfy it. *Held*, that the evidence was properly excluded. In the absence of an agreement between the parties there is no legal satisfaction of a mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until the rents and profits are applied by judgment of a court in satisfaction of the mortgage. Ejectment will not lie by a mortgagor against a mortgagee in possession, so long as the mortgage subsists.

ACTION of ejectment brought by Alfred S. Hubbell, trustee, etc., against Charles Moulson, to recover possession of the undivided half of a lot of land. The opinion states the facts. The defendants obtained a verdict. A new trial was denied at general term, and plaintiff appealed to this court.

Francis Kernan, for appellant, cited 3 R. S., 3d ed., 599, 850 ; 4 Kent's Com., 11th ed., 169, note 4 ; *Edwards v. Farmers' Ins. Co.*, 21 Wend. 467. S. C. in error, 26 id. 541 ; *Arnot v. Post*, 6 Hill, 65 ; *Kortright v. Cady*, 21 N. Y. 343 ; *Waring v. Smith*, 2 Barb. Ch. 119, 135.

W. F. Cogswell, for respondent, cited *Van Duyne v. Thayer*, 14 Wend. 223 ; *Phyfe v. Reiley*, 15 id. 248 ; *Chase v. Peck*, 21 N. Y. 581 ; *Hubbell et al. v. Sibley*, MS.

ANDREWS, J. The plaintiffs claim title under Alfred Hubbell, the mortgagor, to the undivided half of premises mortgaged by him to Hiram Sibley, December 1, 1846, to secure the payment of \$7,000. The action is ejectment, and it was necessary for the plaintiffs, in order to recover under their complaint, to show that they were entitled, as against the defendants, to the possession of the premises at the time of the commencement of the action. The defendants are the grantees of Sibley, the mortgagee, under a deed dated June 7, 1849, and are in possession, claiming under that deed. They stand, by reason of that conveyance, in privity with the mortgagee, and their right to the possession is the right of the mortgagee, and the rights of the plaintiffs depends upon the same principles as if Sibley was in possession and the action had been brought against him. *Jackson v. Mueller*, 10 Johns. 479; *Jackson v. Bowen*, 7 Cow. 13 ; *Robinson v. Ryan*, 25 N. Y. 320. The plaintiffs on the trial offered to prove that the mortgage debt had been paid by the receipt by Sibley, before the commencement of the action, of rents and profits from the land sufficient to satisfy it. The evidence was excluded. If the mortgage was in law subsisting and unsatisfied when the action was commenced, then it cannot be maintained, as the authorities are decisive that ejectment will not lie by a mortgagor against a mortgagee in possession. *Van Duyne v. Thayer*, 14 Wend. 233; *Phyfe v. Reiley*, 15 id. 248; *Pell v. Ulmar*, 18 N. Y. 139. Leaving out of view the alleged title under the statute foreclosure, the question arises, whether the receipt by a mortgagee, in possession, of rents and profits sufficient to satisfy the mortgage debt does *ipso facto* extinguish it and discharge the lien of the mortgage. If it does not, then the evidence was properly excluded. If admitted it would not have shown a right in the plaintiffs to the possession of the premises when the action was brought.

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It is the settled doctrine in this State that a mortgagee has by virtue of his mortgage a lien only, and not an estate in the land mortgaged. *Runyan v. Mersereau*, 11 Johns. 537; *Jackson v. Craft*, 18 id. 110; *Jackson v. Bronson*, 19 id. 325; *Kortright v. Cady*, 21 N. Y. 343; *Stoddard v. Hart*, 23 id. 560. In harmony with this view, it was held in *Kortright v. Cady* that a tender of the mortgage debt after it became due discharged the lien of the mortgage and prevented a subsequent foreclosure. And it was held in *Edwards v. The Firemen's Fire Ins. and Loan Co.*, 21 Wend. 467; 26 id. 541, that upon a tender after default by a mortgagor of the mortgage debt, ejectment would lie in his favor upon the refusal of the mortgagee to surrender the possession. But while no title in a strict sense vests in the mortgagee of land until foreclosure, yet his interest is in some cases treated and regarded as a title, for the purpose of protecting and enforcing the equities between parties. An instance of this kind is found in *Mickles v. Townsend*, 18 N. Y. 575, where it was so held for the purpose of applying the doctrine of estoppel by deed against a person claiming as assignee of a mortgage, which existed at the time of his prior conveyance of the mortgaged premises with warranty, but which was assigned to him afterward. And in *Van Duyne v. Thayre*, 19 Wend. 162, the release of the equity of redemption by the mortgagor to the mortgagee was held to inure as an enlargement of the estate of the mortgagee, so as to prevent the plaintiffs recovering dower at law, in disregard of the equity of the defendant to have the mortgage first satisfied out of the land. COWEN, J., 21 Wend. 485.

It is easy to see that where the English doctrine prevails, that the mortgage conveys a legal title to the mortgaged premises, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law, the mortgagee is the owner of the estate, and takes the rents and profits in that character. In equity, the mortgagor is regarded as the owner until foreclosure, and his right to an account is incident to his right of redemption. 2 Washb. on Real Property, 161, 205; *Seaver v. Durant*, 39 Vt. 103; *Parsons v. Welles*, 17 Mass. 419. But the necessity to resort to an accounting in equity, in order to have the rents and profits applied to the satisfaction of the mortgage, is not obviated by the fact that here the mortgagor retains the legal title. The mortgagee in possession takes the rents and profits in the *quasi* character of trustee or

bailiff of the mortgagor. 2 Pow. on Mort. 946 *a*; 2 Washb. 205. They are applied in equity as an equitable set-off to the amount due on the mortgage debt. *Ruckman v. Astor*, 9 Paige, 517. The law does not apply them as received to the payment of the mortgage. It depends upon the result of an accounting upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs in defending it; and if he has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. So he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default. 2 Powell on Mort. 957, note; 4 Kent, 185; 2 Washb. 218; *Cameron v. Irwin*, 5 Hill, 272; *Mickles v. Dillaye*, 17 N. Y. 80. In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt. In the absence of an agreement between the parties there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage. These considerations lead to an affirmance of the judgment, without considering the question of the validity of the statute foreclosure.

The plaintiffs claim to recover upon the allegation of a right to the possession of the premises when the action was commenced. The defendants were in possession, claiming under the mortgagee, whose mortgage was outstanding and unsatisfied. The action is not for a redemption or for an accounting, and the plaintiffs are not in the attitude of resisting an attempt by the mortgagee to enforce the mortgage.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Simar v. Canaday.

SIMAR, appellant, v. CANADAY.

(33 N. Y. 298.)

Dower — inchoate right of, will be protected. Joint action for several injuries. Misrepresentations as to value.

A man was induced by fraudulent representations to convey land, his wife joining in the conveyance to release dower. *Held*, (1) that the wife had a right of action for deceit in respect of her inchoate right of dower; (2) that the husband and wife could maintain a joint action; and, (3) that whether a representation as to the value of property is merely the expression of an opinion or an affirmation of a fact, is a question for the jury.

ACTION by Charles Simar and wife against George Canaday to recover damages for an alleged fraud on the part of the defendant in inducing plaintiffs to convey to defendant certain premises, and to receive as part payment therefor three bonds and mortgages of \$1,000 held by the defendant on other lands, which plaintiffs allege to be worthless. The wife joined in the deed of the premises to defendant to release her dower right. The three mortgages were by plaintiff's direction, and as a gift from him, assigned by defendant to plaintiff's wife.

The jury rendered a verdict for plaintiffs, and exceptions were ordered to be heard in the first instance at general term. The general term set aside the verdict and plaintiffs appealed. Some of the preliminary portions of the opinion in nowise bearing on the main questions have been omitted.

Lyman Tremain, for appellants. Julia Simar held the mortgages assigned to her as a trustee for Charles Simar, who is a proper party to this action. *Rider v. Kidder*, 10 Ves. 366; *Lloyd v. Read*, 1 P. Williams, 607; *Eband v. Dower*, 2 Ch. Cas. 26; S. C., 1 Eq. Abr. 382, p. 11; 2 Madd. Ch. Pr. 101; *Garfield v. Hatmaker*, 15 N. Y. 475; *Everett v. Everett*, 48 id. 218. If there was a misjoinder of plaintiffs, it was the duty of the general term to affirm so much of the judgment as is correct. Code, §§ 173, 274, 330; *Ackley v. Tarbox*, 31 N. Y. 564; *Brownell v. Winnie*, 29 id. 400; *W. and O. Coll. Inst. v. Blackman*, 48 id. 683; *Staats v. R. R. Co.*, 39 Barb. 298; *Decker v. Hassell*, 26 How. Pr. 528. Plaintiffs could maintain this

action on the ground of the fraud practiced to induce Mr. Simar to take the securities at his own risk. 1 Cow. Tr. (5th ed.) 36, § 76, citing 3 Comp. 154; 6 I. R. 110; 7 W. R. 380, 387; Story on Cont., § 495; 32 N. Y. 272; 16 Wis. 485. The interest of Julia Simar conveyed by her deed was sufficient to afford her a cause of action for fraud. Laws 1840, chap. 177; 1 Story's Eq. Jur., § 656; *Jackson v. Edwards*, 7 Paige, 408; 3 Alb. L. J. 126; *Ropper v. Gilbourne*, 8 How. 456. False and fraudulent statements as to what the property sold for afforded a ground of action. 30 N. Y. 655; *March v. Falker*, 40 id. 562; *Clark v. B.*, 2 Lans. 67; *Sandford v. Handy*, 23 Wend. 268; Clark's Ch. (Moak's ed.) 417.

Matthew Hale, for respondent. Plaintiffs could not maintain a joint action. *Palmer v. Davis*, 28 N. Y. 262; *Mann v. Marsh*, 35 Barb. 68; *Dundendale v. Grymes*, 16 How. 195; *Brownson v. Gifford*, 8 id. 389. Defendant's representations as to the mortgages and land being good were matters of opinion, and no action could be sustained upon them if false. *Vesey v. Dolton*, 3 Al. 380; Story on Sales, §§ 165, 168; *Starr v. Bennett*, 5 Hill, 303; *Van Epps v. Harrison*, id. 63, 69; *Chester v. Comstock*, 6 Rob. 1; *Herman v. Cooper*, 8 Al. 334; *Medbury v. Watson*, 6 Metc. 246, 259, 261; *Taylor v. Scoville*, 54 Barb. 34. There was no proof that defendant knew the allegations to be false, or assumed to know they were true. *Oberlander v. Spiess*, 46 N. Y. 175; *Meyer v. Amidon*, id. 169; *Marsh v. Falker*, 40 id. 562; *Marshall v. Gray*, 57 Barb. 414; *Bernard v. Spring*, 42 id. 470; *Robinson v. Flint*, 58 id. 100; *Clark v. Bamer*, 2 Lans. 67, 70; *Chester v. Comstock*, 6 Rob. 1; affirmed, 40 N. Y. 375, note. Fraud must be proved and cannot be presumed. *Starr v. Peek*, 1 Hill, 270, 272, 274; *Marsh v. Falker*, 40 N. Y. 562; *Fleming v. Slocum*, 18 Johns. 403. Fraud without damage is not actionable. *Taylor v. Scoville*, 54 Barb. 34. It was error not to allow defendant to show value of the Newtonville property. *Likes v. Beers*, 10 Iowa, 89.

FOLGER, J. The defendant moved at the circuit to dismiss the complaint, and was denied. The motion was put upon different ground.

[The first and second grounds are omitted, being unimportant.]

3d. That the plaintiff, Julia Simar, had made out no cause of action in her favor, and that her complaint should be dismissed.

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There is no testimony to show that she had any right or interest in the Newtonville property, save that given by her husband above mentioned, and the proof of an inchoate right of dower therein. In face of the allegations and admissions of the pleadings, and of the proof furnished by the deed to her husband, it cannot be contended that she can be held the owner of any right or interest therein other than the inchoate right of dower. Nor can her right of action be placed upon the assignment of the mortgages by the defendant to her, and her ownership of them thereby. Though they should be conceded to have turned out altogether worthless, and to have been taken solely upon false and fraudulent statements of the defendant, it is not thereby established that she has any cause of action against him ; for she has not, as the donee of them from her husband, sustained damage in such legal sense as would entitle her to recover for a fraud which did not affect her property. The gift of value which was contemplated to be made to her was of no worth when received. This was *damnum absque injuria*. She has no remedy therefor, because no right has in contemplation of law been invaded. See *Mahan v. Brown*, 13 Wend. 261. The refusal or discontinuance of a favor gives no right of action. *Id.* That a favor done is not fruitful of profit by reason of the wrongful act of a third person preventing, brings no different result.

Is her inchoate right of dower in the property obtained by the defendant, by the conveyance in which she joined and thereby released that right to him, such a right and interest as the law will protect from injury ? This court, in *Moore v. The Mayor, etc.*, 8 N. Y. 110, has held that the wife has no interest in the lands of her husband which requires that compensation shall be made to her on the taking of them for a public purpose. The act of the legislature in that case directed a just estimate of the damage to the persons interested in the lands. It was held that, as the right of the wife was contingent upon her surviving her husband, it was such a possibility as might be released, but was not the subject of grant or assignment, nor, in any sense, an interest in real estate. In *Barbour v. Barbour*, 46 Me. 9, it is held that an inchoate right of dower is subject to be modified, changed, or even abolished by legislative enactment. But, notwithstanding these, there are authorities that the inchoate right of dower is a valuable right, and will be guarded and preserved to the wife by the judgments of the courts. There are cases in which it has been held that the release

of an inchoate right of dower is a good consideration in equity for an agreement by the husband with the wife, and she has been assisted in enforcing the same. *Garlic v. Strong*, 3 Paige, 440. A wife who executes a mortgage jointly with her husband is nevertheless entitled to dower in the equity of redemption of which her husband is seized, notwithstanding the mortgage, which right is not affected in equity unless she is made a party to the foreclosure. If omitted, she can come in at any time and redeem, notwithstanding a decree and sale in the foreclosure suit. *Mills v. Van-Voorhies*, 20 N. Y. 412, where it was held that the existence of an inchoate right of dower in the equity of redemption of mortgaged premises was a good objection to title by a vendee in an action against him for specific performance of his contract. In that case, this strong expression is found: "The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow." In *Mathews v. Duryee*, 4 Keyes, 525; S. C., 3 Abb. Ct. App. Dec. 220, the inchoate right of dower of a wife was held to attach to surplus moneys arising upon a sale on foreclosure of mortgage; a judgment in her favor for the value of her dower in that fund was affirmed. There was strong dissent in that case, and *Moore v. Mayor, etc., supra*, was cited by the minority of the court with approval, though the dissent is not placed directly upon the ground that an inchoate right of dower is not an interest which will be protected and enforced. See also *Jackson v. Edwards*, 7 Paige, 386; S. C., 22 Wend. 498. And in the Supreme Court are cases which have been acquiesced in, and cited with approval in this court. *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 id. 561. We think that it must be considered as settled in this State, notwithstanding *Moore v. The Mayor*, and some *dicta* in other cases, that, as between a wife and any other than the State, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end. Inasmuch as the acts alleged against the defendant, if proven to the extent averred, did work harm to such a right and interest of the plaintiff Julia Simar, she had a right of action against him for the damages sustained. Moreover, granting that she had no interest in the property which gave her a cause of action, yet the erroneous denial of the motion to dismiss the complaint, as to her, was not reason for a new trial.

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The general term, if there was no other error, should, having power so to do, have corrected this, making itself the order in that respect which was asked for at the circuit, and have sustained the action at circuit in favor of the other plaintiff. If he showed a cause of action and recovered, he should not be put to a new trial solely because his co-plaintiff did not the same.

4th. Having thus shown that both Simar and his wife had a cause of action (if it be assumed that a case of fraudulent representations had been made out), the objection of the defendant, in its exact letter, returns.

That objection was, that no *joint* cause of action in favor of the plaintiffs had been made out. The cause of action we have found in the husband is that he is defrauded of the fee in the premises; that in the wife is that she is defrauded of her inchoate right of dower, which is consequent upon his title in fee. They are not strictly the same thing, yet they are bound together in the same property; they are taken out of the owners by the same instrument, and that instrument is induced and the two rights are lost, as is alleged, by the same fraudulent acts. One recovery will satisfy both claims, and one judgment be a bar to another action by either of the plaintiffs. The acts of the defendant were done at one time to both plaintiffs, and were an injury to both plaintiffs, inflicted at the same time; hence, there is such common interest in the subject of the suits as to authorize them to join in one suit, although the injury which each sustained is separate and distinct. In equity, this rule has often been announced; as where creditors, by different judgments, united in one action as plaintiffs to detect and repress the fraud of the debtor. *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; see also *Fellows v. Fellows*, 4 Cow. 682; where owners of different tenements affected by a nuisance, joined in an action to prevent it; *Peck v. Elder*, 3 Sandf. 126, note [a]; where proprietors of different mill sites united in an action to restrain a division of the water-course. *Reid v. Gifford*, Hopk. 416. And at law, if a covenant be joint expressly, it will not be construed to be several by reason of several interests, per JEWETT, J. *Pearce v. Hitchcock*, 2 N. Y. 388. In an action on an injunction bond, the subject of the action being the damage sustained by the obligees, they may all join as plaintiffs, notwithstanding the claim of one of them is different in character and amount from that of the others. *Loomis v. Brown*, 10 Barb. 325. And the Code (section 59) having abolished all distinction

between actions at law and suits in equity, and provided for but one form of action, then (section 117) enacts that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided. Here both plaintiffs have an interest in the subject of the action; be that subject the property conveyed, or the acts of the defendant and the consequent damage, and both have an interest in obtaining the relief demanded. "There is a common point of controversy, the decision of which affects the whole, and will settle the rights of all," so far as the issues in this action are concerned. See also *Hubbell v. Meigs and others*, 50 N. Y. 480.

These considerations apply to the ground upon which the case was disposed of at general term; but many other exceptions were taken by the respondent at the trial, and are now urged here, and, as we have said, he has a right to renew them here, and maintain the order of the general term for a new trial, if any of them appear to be well made.

The defendant contends that the representations alleged to have been made by the defendant were not such as to afford a ground for an action. It is first insisted that the statements as to the value of the lands and of the mortgages thereon were mere matter of opinion and belief, and that no action can be maintained upon them if false. If they were such, no liability is created by the utterance of them; but all statements as to value of property sold are not such. They may be, under certain circumstances, affirmations of fact. When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them and is misled to his injury, they avoid the contract. *Stebbins v. Eddy*, 4 Mason, 414-423. And where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damage sustained. *Mulberry v. Watson*, 6 Metc. 246, per HUBBARD, J.; and see *McClellan v. Scott*, 24 Wis. 81.

This exception of the defendant arises in two forms: one on the motion to dismiss the complaint for want of sufficient proof; and again on a request to charge, which was acceded to, with a qualification. In its first form, we have only to inquire whether there was enough in the testimony to require of the trial court to

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give the question to the jury. Whether a representation as to the value is merely an expression of opinion or belief, or an affirmation of a fact to be relied upon, is a question for the jury. On looking into the testimony, we think that it was properly left to their decision.

The judgment of the general term should be reversed, and the plaintiffs should have judgment upon the verdict in their favor at the circuit, with costs.

All concur, except ANDREWS, J., dissenting.

Judgment accordingly.

MARTINE V. THE INTERNATIONAL LIFE INSURANCE SOCIETY OF LONDON

(58 N. Y. 832.)

Agency — death of co-agent. Life insurance — foreign company — effect of war on policy.

Where a firm are employed as agents, their authority is determined by the death of one partner.

The defendant, a foreign life insurance company, having complied with the statute authorizing it to carry on business in New York, established there a permanent general agency and a local board of directors, and there conducted its business and issued its policies as a distinct organization. *Held*, that a policy thus issued prior to the war of the rebellion to a citizen of one of the late Confederate States, was governed by the same principles of law as it would have been had it been issued by a domestic corporation, and that payment of the premium thereon was excused during the war, and that where the insured died before the close of the war no tender of the unpaid premiums was necessary at its close, but that the same could be adjusted by making proper deductions from the policy, and that the company was liable for the residue.

ACTION on a policy of life insurance issued by the defendant upon the life of James Martine of Fayetteville, N. C., for the sum of \$5,000.

Defendant is a foreign corporation, organized under the laws of Great Britain. Upon compliance with the provisions of the insur-

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ance laws of this State it had been authorized to do business here, and had an office in the city of New York, under the direction of a local board of directors, acting and holding their meetings in said city, where policies were issued, premiums received and losses paid, and acting in all respects as a distinct organization. Its general agents here appointed agents in the other States. The firm of Starke & Pearce were appointed its agents at Fayetteville. The policy in suit was issued June 4, 1851, dated at the New York office. The premiums were regularly paid up to and including the payment of June, 1861, to said agents. Prior to June, 1862, Stark died. The premiums for 1862, 1863 and 1864 were paid to Pearce, the surviving partner. Martine died October 9, 1864. After his death, Hester Martine, his wife, to whom the policy was made payable, assigned the same to the plaintiff. Other facts appear in the opinion. The referee directed judgment for the full amount of the policy, with interest. The general term reversed the judgment entered on the report and the plaintiff appealed.

F. R. Coudert, for appellant.

Burton N. Harrison, for respondents. The agency of Starke & Pearce ended with the death of Starke, and the payments made to Pearce afterward were not valid. *Bouton v. Am. Mut. Life Ins. Co.*, 25 Conn. 542; S. C., 1 Big. L. & Ac. Ins. R. 59-62; Story on Agency, § 430, and authorities cited; id., § 42, and authorities cited; Dunlap's Paley on Agency, 177; *Green v. Miller*, 5 Johns. 39; *Brown v. Andrew*, 13 Jur. 938; Story on Bail., § 202; 1 Lindley on Part. 84, 211, citing *De Mazar v. Pybus* and *Kundoon v. Paylens*, 4 Vesey, 649; Parsons on Part. 7, 438, 449, and authorities cited; *Van Keuren v. Parmelee*, 2 N. Y. 525; 1 Lindley on Part. 417; 1 Hill. on Cont. 624, 625; *Johnson v. Wilcox*, 25 Ind. 184; *Tasker v. Shepherd*, 6 Hurl. & Norm. (Exch. Ch.) 575; 5 Lans. 535; 62 Barb. 181. After 1861 the assured was not excused from paying the premiums in New York or London. *Oakley v. Martin*, 11 N. Y. 25; *Catlin v. Tobias*, 26 id. 47; *Harmony v. Bingham*, 12 id. 49; *Tompkins v. Dudley*, 25 id. 272. The existence of the rebellion did not affect this case; the insurer was a British corporation. *Robinson's Case*, 52 Barb. 450; S. C., 42 N. Y. 54; 1 Am. Rep. 490.

CHURCH, Ch. J. The referee found that payments upon the policy had been duly made up to the death of Mr. Martine. The

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payment to the agents, Starke & Pearce, in April, 1861, was good. They were the agents of the defendant at Fayetteville, North Carolina, and the assured had repeatedly been notified to pay the premiums at the office of their agency at that place. The instructions to the agents as to the manner of receiving them, viz., upon receipts forwarded from the New York office, were never communicated to the assured, and she was not affected by them. She was directed to pay at the office of their agent, and she had a right to comply with the direction.

The validity of the subsequent payments for 1862, 1863 and 1864 is more difficult to be maintained. Between 1861 and 1862, Starke, one of the firm, died, and the payments were made to and received by Pearce, as surviving partner. The assured is chargeable with notice of the death of Starke, and the authority by which Pearce assumed to act, by the receipts executed and received for the premiums for those years. He did not profess to be the agent of the defendant, but acted as the surviving partner of the firm who had been agents. There is no authority to sustain his right to so act. The death of one member of a firm operates immediately and inevitably as a dissolution. Story on Part., § 317; Pars. on Part., § 438. During the existence of a partnership, each member is deemed to be authorized to transact any business for the firm, but upon dissolution this authority ceases, and the only authority of the survivor is to close up the business. He has no right to create new obligations, nor indeed to do any thing in the name of the firm, except such as is necessary in adjusting and closing its concerns. *Van Keuren v. Parmelee*, 2 N. Y. 523. It is a general rule of the common law that an authority by a principal to two persons to do an act is joint, and the act must be concurred in by both. Dunlap's Paley on Agency, 177; *Green v. Miller*, 6 Johns. 39; 13 Jurist, 938; Story on Agency, § 42. When a firm is appointed to an agency, this rule would necessarily be modified to the extent that either member of a firm could do any act within the scope of the agency, the same as he could perform any other partnership act. By appointing a partnership firm it would be implied that the authority was joint and several. But upon dissolution of the firm such an agency would cease. This is the necessary result of the principles alluded to. The principal would not be bound by the act of a surviving member of a firm, because he had never appointed him to act nor agreed to be responsible for his acts, and the latter could

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incur no obligation against the deceased member or his representatives.

The counsel for the appellant suggested that, as the notice to the assured required payment at the office of its agent in Fayetteville, she was justified in paying at the office of Starke & Pearce. The answer is, that if the company had no agent, then it had no office of an agent, and, as we have seen, the agency ceased upon the death of Starke. It is also suggested that it was the duty of the company to appoint an agent at that place to receive the premiums, and that it cannot take advantage of its own negligence. There is nothing in the contract indicating Fayetteville as the place of payment. The notices to pay at Fayetteville would justify such payments, so long as the privilege was unrecalled and the defendant had an agent there. Upon the death of Starke the agency ceased, which the assured must have known, and the defendant was under no legal obligation to appoint another, but the obligation to pay the premiums to the society remained. The case of *Hamilton v. Mutual Life Ins. Co.*, 9 Blatch. 235, was different. By the contract the premiums were payable to an agent residing in Alabama, appointed in pursuance of a statute of that State, and required as a condition of transacting business there. The company revoked the agency, which prevented the assured from paying the premiums, and the court held the assured excused. Here there was no statute and no contract to pay or receive the premiums at the place where they were paid.

There were three notices produced for the years 1852, 1853 and 1855, which stated the time when the premiums for those years were due, and that they must be paid at the office of the Fayetteville agency within thirty days, or the policy would be void, but two of them stated that the notice was not required by the rules of the society, and that the want of it would not excuse non-payment. It was not a notice that all premiums must be paid at Fayetteville, but that those specified must be. The notices would have justified such payments so long as defendant had an agent there, but cannot be construed into a contract that the company must always have an agent at that place, or that payments might always be made there.

We think the general term right in holding that the referees erred in finding the payments for the specified years duly made. This is irrespective of the effect of the war upon the trans-

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action, but it disposes of the findings of the referee, which were reversed by the general term.

It is now claimed that, within the principles recently adjudicated in the *Cohen and Sands Cases*, 50 N. Y. 610, 626; 10 Am. Rep. 522, 535, payment of the premiums for the specified years was excused and the liability suspended during the existence of the war, and that the payments could be made at its close if promptly tendered. As the person whose life was insured died before the war closed, no tender of premiums was necessary, and they could be adjusted by making proper deductions from the amount of the policy. The two cases cited are controlling against the defendant in this case, unless the fact that the defendant was a foreign corporation takes it out from the operation of those decisions.

It is claimed that the defendant, being a foreign corporation, could acquire no domicile here; that it was a neutral, and could lawfully transact this business with the citizens of either belligerent, and that the respective obligations of the parties were not affected by the war. The case of *Robinson v. The Same defendant*, 42 N. Y. 54; 1 Am. Rep. 490, seems to favor this defense. HUNT, J., says: "If it is conceded that a contract of insurance by a citizen of this State upon the life of a citizen of Virginia, in the year 1862, would have been avoided or suspended, on the ground that the condition of war will not permit such contracts between the citizens of States at war with each other, we do not then reach the case before us. This was a contract between a citizen of a neutral country and a citizen of a belligerent country." * * *
* * * "Such contracts are valid by the laws of all countries." It appeared in that case, as in this, that the defendant had a place of business in New York, and carried on the business of life insurance by general agents and a local board of directors; and it is averred in the answer in this case that it acted as a distinct organization within the United States, issuing policies, etc., under the direction of a board of directors, acting and holding their meetings in the city of New York, where it had an office, with directory and executive officers, who appointed agents throughout the United States. The court observed as to these facts: "It is important to observe that the New York board were but agents, however general their character or unlimited their authority. The principal was the company itself in England." The authorities cited to support the decision that the war did not affect the performance of the con

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tract were *Ludlow v. Bowne*, 1 Johns. 1; *De Wolf v. Firemen's Ins. Co.*, 20 id. 214; affirmed, 2 Cow. 56. The first was an action upon a policy of insurance upon goods (not contraband), contracted to be sold and delivered to a French merchant at St. Vallery, and warranted to be American property. War existed between England and France at the time, and the property was captured by an English cruiser on the voyage and condemned by a British admiralty court as French property. Our supreme court held that the title to the property had not passed from the American merchant, and that the warranty was verified. SPENCER, J., said: "By the law of nations a neutral has a right, with the exception of contraband goods and going to a blockaded port, to supply the belligerents." The other case was analogous in its facts, and the same decision was reached. The only principle established was that a neutral may carry on commerce with a belligerent during war, as well as in peace, with the exceptions above named. The applicability of this principle to the circumstances of this case is not perceived, and it was unnecessary to determine it in the Robinson case. That case was rightly decided, and the decision must have been the same if the defendant had been a domestic instead of a foreign corporation, upon the ground that the payments to the agent were properly made.

It is true that the residence of a corporation is in the State of its creation, and it is well established that such residence cannot be changed, and if it was a question of domicile merely the point would be too clear for argument. It may be admitted, also, that it was competent for defendant, or any other foreign corporation, to make contracts of insurance upon the lives of citizens of either belligerent during our late war, and that neither the contracts nor their performance would be affected by the war. But this does not reach the case. The defendant sought and obtained the privilege of establishing and carrying on its business here under the regulations fixed by the statutes of this State. It established a permanent general agency, and conducted its business here as a distinct organization, and was permitted by law to do this in the same manner as domestic institutions. The business thus established and carried on in New York was designed to be confined to the United States, and necessarily partook of the national character as a privileged business. Chancellor KENT, in his Commentaries, says. "The position is a clear one, that if a person goes into a foreign

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country and engages in trade there, he is by the law of nations to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral." 1 Kent's Com. 84. Nor is it invariably necessary that the residence be personal. While the general rule is that a principal transacting business in the ordinary way, through an agent, will not contract the character of a domiciled person, yet if the principal be trading not on the ordinary footing of a foreign trader, but as a privileged trader, such a privileged trade puts him on the same ground with their own subjects, and he would be considered as sufficiently invested with the national character by the residence of his agent. *Id.*

This contract was made in New York by authority of its laws. Although not stated in express terms that the premiums were to be paid there, it is evident from the facts that the parties contemplated payment there, unless otherwise directed, for convenience of the assured, by the local board. The repayment of money borrowed was expressly provided to be made in New York, and the organization of a local board and the privileges granted by our laws, as well as the acts of the parties, including the notices above referred to, indicate that these contracts were to be made and performed there. It was essentially an independent American business, and would be treated as such, I have no doubt, if war existed between this country and England. The mischief of communication between the parties would be the same as if the defendant was a domestic instead of a foreign corporation. The transfer of funds from the New York agency to the assured, in case of death, or the transfer of premiums, would not have been tolerated. It is claimed that if it was impossible to pay in New York, the assured was obliged to pay in London. I do not think this is the fair construction of the contract. The surrounding circumstances significantly repel this idea. True, the payments are to be made to the society, but that means to the society as locally organized. If the defendant's views are correct, all payments were legally required to be made in London, whether it was practicable to make them in New York or not. True, the defendant might have discontinued the business here; but our statute requires, in that event, the continuance of an agency for some purposes, and the continuance of the deposit for the benefit of policyholders, and if it should withdraw all agencies for receiving premiums, so that it was impracticable to pay them, it

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would be the fault of the company, of which it would not be permitted to take advantage. 9 Blatch. 235. It would be most unreasonable for these foreign corporations to ask the privilege of doing business under our laws in competition with domestic institutions, and then to ask exemption from the obligations and liabilities which attach to the latter. As to the business transacted here, the company must be regarded as domiciled by the residence of its general agents and its local organization. In 2 Gall. 235, STORY, J., lays down the rule "that when a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing and with the same advantages as a native resident subject, his property, so employed, is to be deemed incorporated into the general commerce of the country, and subject to be confiscated, be his residence where it may." The English Admiralty Courts have always maintained this doctrine. In 1 Rob. Ad. Cases, 15, it is laid down "that there is a traffic which stamps a national character on the individual, independent of that character which mere personal residence may give him." See also 5 Rob. 302; 4 id. 109; 1 Duer on Ins. 527. The assured did all she could to make payment of the premiums. It was not lawful to make payments in New York, where they were to be made.

The defendant claims that the plaintiff purchased the claim as attorney for the purpose of prosecution, in violation of the statute. There is no finding upon the subject, and the evidence is not conclusive either that the plaintiff was a lawyer at the time of the assignment of the claim, or that he, in fact, purchased it with the prohibited intent within the meaning of the statute.

It is also insisted that the obligation of the defendant to pay was not absolute, but only that certain funds of the society should be subject and liable to pay the assured. This point was not raised upon the trial. If it had been, it might have been avoided. The defendant must be presumed to have waived it. The premiums not paid must be allowed.

The order granting a new trial must be reversed, and judgment of referee modified, by deducting the premiums payable in 1862, 1863 and 1864, with interest, and, as modified, affirmed without costs to either party as against the other.

All concur, except GROVER, J., not voting.

Judgment accordingly.

Tift v. Horton.

TIFFT V. HORTON, appellant.

(53 N. Y. 377.)

Fixtures — when intention will control.

The owner of an elevator purchased from the plaintiff an engine and boiler to place therein, and to secure a part of the purchase-money gave his promissory note, secured by chattel mortgage upon the property wherein it was stipulated that the engine and boiler should be and remain personal property until the note was paid. They were placed upon a foundation outside of the elevator and a house was built over them. *Held*, that the engine and boiler continued personal property until the note was paid, as against a prior mortgagee of the realty.

ACTION to recover for the alleged conversion of an engine and boiler.

The plaintiff manufactured and sold to one Mrs. Brown an engine and boiler to be by her put up and used in a new elevator which she was then building, and Mrs. Brown gave her promissory notes for a portion of the purchase price, and to secure its payment executed to plaintiff a mortgage upon the engine and boiler wherein it was stipulated and agreed that the engine and boiler should be and remain personal property until the notes were paid, notwithstanding the manner in which they should be placed in the elevator, and that in case of default in payment of the notes the plaintiff should have the right to enter the elevator and remove the property.

The engine and boiler were put upon a foundation constructed for them outside of the elevator building, and a building called the engine-house was built over them. Mrs. Brown failed to pay the note and plaintiff went to remove the property as provided in the mortgage. The defendant was in possession of the elevator, claimed to own the engine and boiler, and refused to let the plaintiff have them. The defendant claimed title under a foreclosure sale of mortgages on the elevator executed by Mrs. Brown prior to the putting in of the engine and boiler. By stipulation it was agreed that the sale on foreclosure should not in any manner change the legal rights of the parties.

The jury rendered a verdict for the plaintiff for \$5,141, and judgment was entered thereon. This judgment was affirmed by the general term and defendant appealed.

M. A. Whitney and *R. W. Peckham, Jr.*, for appellants. The engine and boiler became a part of the realty, and were subject to the liens of defendant's mortgages. *Potter v. Cromwell*, 40 N. Y. 287; *Voorhees v. McGinnis*, 41 id. 278; *Sparks v. State Bk.*, 7 Black. (Ind.) 469; *Capen v. Peckam*, 35 Conn. 88; *Alvord C. M. Co. v. Gleason*, 36 id. 86. The agreement in the chattel mortgage was of no avail, unless consented to by the mortgagee of the real estate. 5 Am. L. Reg. (N. S.) 329, 330; *Leland v. Gassett*, Dig. (Vt. Rep.) 335; S. C., 17 Vt. 403; *Preston v. Briggs*, 16 id. 124; *Van Ness v. Pacard*, 2 Peters, 137; *Walmsley v. Milne*, 6 Jur. (N. S.) 125; S. C., 7 C. B. (N. S.) 115; Grady's Law of Fixtures, 153; 4 Metc. 310; *Butler v. Parker*, 7 id. 42; *Lane v. King*, 8 Wend. 584; *Shepard v. Philbrick*, 2 Den. 174; *Gillett v. Balcom*, 6 Barb. 370. Under a mortgage on the land alone; all fixtures erected prior or subsequent to the mortgage are embraced. 7 C. B. (N. S.) 135, and cases cited; 4 Deac. Ch. 703; 4 E. D. S. 474; 2 Barn & C. 96; 2 Adol. & El. 157; 19 Barb. 317; 6 id. 370; 15 Mass. 159; 7 Metc. 40; 8 Wend. 584; 2 Den. 174; 2 Sandf. Ch. 359.

John Ganson, for respondents.

FOLGER, J. It is well settled that chattels may be annexed to the real estate and still retain their character as personal property. See *Voorhees v. McGinnis*, 48 N. Y. 278, and cases there cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is, that they shall not by annexation become a part of the freehold, as a general rule they will not. The limitation to this is, where the subject or mode of annexation is such, as that the attributes of personal property cannot be predicated of the thing in controversy (*Ford v. Cobb*, 20 N. Y. 344), as where the property could not be removed without practically destroying it, or where it or part of it is essential to the support of that to which it is attached. Id.

It may in this case be conceded, that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid; and by the same agreement, power was

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given to the plaintiffs, to enter upon the premises in certain contingencies, and to take and carry them away. While there is no doubt but that the intention of the owner of the land was that the engine and boiler should ultimately become a part of the realty, and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs, that the act of annexing them to the freehold should not change or take away the character of them as chattels, until the price of them had been fully paid. And as the parties may by their agreement, expressing their intention so to do, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves, the agreement in this case was fully sufficient to that end.

But it is contended that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the lands; and that here the defendants, prior mortgagees of the real estate, were interested, and have not expressed nor shown such intention. It is not to be denied, that as a general rule all fixtures put upon the land by the owner thereof, whether before or after the execution of a mortgage upon it, become subject to the lien thereof. Yet I do not think that the prior mortgagee of the realty can interpose before foreclosure and sale, to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands, after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiffs, on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee, and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such an agreement, upon the covenants in his conveyance of the lands. *Mott v. Palmer*, 1 N. Y. 564; and see *Ford v. Cobb*, *supra*.

A prior mortgagee, who certainly has not been induced to enter into his relations to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto, has no greater right than a subsequent mortgagee. Neither could claim as subject to the lien of his mortgage, personal property brought on to the premises with permission of the owner of the lands, and not at all affixed

thereto. Nor can either claim personal property as so subject, from the mere fact of the affixing, where, by the express agreement of the owner of the fee and the owner of the chattel, its character as personal property was not to be changed, but was to continue, and it to be subject to a right of removal by the owner of the chattel on failure of performance of conditions. The language of the authorities is, that the chattel in such case is personal property, for which an action of trover for the conversion of it may be maintained. *Smith v. Benson*, 1 Hill. 176; *Mott v. Palmer*, *supra*; *Farrar v. Chauffetele*, 5 Den. 527; *Ford v. Cobb*, *supra*.

Another consideration makes it clear, I think, that in this case, the absence of a concurrent intention on the part of the prior mortgagees is of no weight. As above stated, as a general rule, all fixtures put upon lands by the owner thereof become a part thereof, and subject to the lien of a prior mortgage; but sometimes it is doubtful if they have been so annexed as to so become. And then, it is said, the question may be decided by the presumed intent of the party making the annexation of the chattels. *Winslow v. Mer. Ins. Co.*, 4 Metc. 306. The law makes a presumption in the case of any one making such annexation, and it is different as the interest of the person in the land is different, that is, whether it is temporary or permanent. The law presumes that because the interest of a tenant in the land is temporary, that he affixes for himself, with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence, it permits annexations made by him to be detached during his term, if done without injury to the freehold, and in agreement with known usages. The law presumes that because the interest of the vendor of real estate, who is the owner of it, has been permanent, that he has made annexations, for himself to be sure, but with a view to a lasting enjoyment of his estate, and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest therein, and the law presumes that improvements which he makes thereon, by the annexation of chattels, he makes for himself, for prolonged enjoyment, and to enhance permanently the value of his estate. *Winslow v. Mer. Ins. Co.*, *supra*. These are presumptions of the intention of the tenant alone, the vendor alone, and of the mortgagor alone; nor are they ordinarily concerned at all, with the relation to the lands, or with the purpose of the landlord, or the vendee, or

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the mortgagee ; though there may be cases in which the intention of both parties may be of effect, as where a mortgagee has loaned money with the understanding that it shall be applied to enhance the value of the estate by the addition of chattels in such manner. And they are but presumptions, which in all cases may be entirely done away with by the facts. *Lancaster v. Eve*, 5 C. B. (N. S.) *717. So in *Elliott v. Bishop*, 10 Exch. *496 ; S. C. in error, 11 id. 113, it is recognized that the express agreement of a tenant may prevent him from the exercise of his right to detach his annexation ; which is the same as to say, that his agreement having shown that it was not his intention to remove them, the presumption of contrary purpose, which would otherwise arise, is repelled. So in *Potter v. Cromwell*, 40 N. Y. 287, and cases cited, it is conceded that if the intention of the vendor of lands be to retain, in chattels annexed thereto, their character as personal property, such intention will prevail. So in *Voorhees v. McGinnis*, *supra*, it is conceded that if the intention of the mortgagor of lands had been that chattels annexed were to be removable, the prior mortgagee could not have held them against the receiver of the goods, etc., of the mortgagor. See also *Crane v. Brigham*, 11 N. J. Eq. (3 Stock.) 29, 35 ; *Teaff v. Hewitt*, 1 Ohio St. (McCook) 511-531. The general rules governing the rights of parties in chattels thus annexed to the real estate rest, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of their relation to and interest in the land, and not from the relation or interest in it of others which may be opposite. And as the presumption of their purpose grows alone out of their relation and interest, it is repelled by whatever signifies a purpose different ; not a different purpose in those holding a relation which may become hostile, but their own different purpose. Hence I conclude that the agreement of the owner of the land with the plaintiffs, as it did fully express their distinct purpose that these annexations of boiler and engines should not make them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees.

Though the defendants became the purchasers of the land on the foreclosure of the mortgages, and were the owners of it in fee, and probably in actual possession of it, and of the boilers and engines annexed to it, before this action was brought or demand

made of them for these chattels, yet they are to be considered in this case only as prior mortgagees of it. Such is the effect of the stipulation made by them that the sale upon the decrees should not in any manner change the legal rights of the plaintiffs in this action; but for this, it would have been necessary to have determined the effect upon the rights of the parties of the sale on foreclosure, and the change of title and possession of the lands, and the application to that state of facts of the principle laid down in *Lane v. King*, 8 Wend. 584, and kindred cases.

It appears that the boilers and engine cannot be removed without some injury to the walls built up about them, and which are a part of the real estate; yet this fact will not debar the plaintiffs. The chattels have not become a part of the building; the removal of them will not take away or destroy that which is essential to the support of the main building, or other part of the real estate to which they were attached; nor will it destroy or of necessity injure the chattels themselves; nor will the injury to the walls about them be great in extent or amount. So that the limitation hereinbefore stated does not apply.

It is proper to add, that the English case cited and much relied upon by the defendants has not been overlooked. *Walmsley v. Milne*, 1 C. B. N. S. * 115. I do not gather from it that the decision was placed upon the ground (as the defendant claims), that the mortgagee of the land did not expect or understand that the chattels annexed were removable or to be removed. The opinion of the court seems summed up in the concluding sentence: "We think, therefore, that when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a *permanent purpose* and for the better enjoyment of his estate, he thereby made them a part of the freehold which had been *vested by the mortgage deed in the mortgagee*." It is to be borne in mind, too, that in England and in Massachusetts the rights of a mortgagee of land in the mortgaged premises are greater than in this State. He is regarded as the owner and the mortgagor in the light of a tenant. So that things annexed to the land become fixtures upon the land of the mortgagee, as it were. See case last cited, page * 133; *Butler v. Page*, 7 Metc. 40.

The judgment should be affirmed, with costs to the respondents.
All concur.

Judgment affirmed.

Dusenbury v. Hoyt.

DUSENBURY, appellant, v. HOYT.

(53 N. Y. 581.)

Bankruptcy — promise to pay debt after discharge.

In an action on a promissory note defendant pleaded his discharge in bankruptcy. Upon the trial plaintiff offered evidence of a promise to pay the note made by the defendant subsequent to the discharge. *Held*, that the evidence was admissible, that the action was well brought upon the original demand and that the new promise could be proved in avoidance of the discharge.

ACTION on a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial after proof of the discharge, plaintiff offered to prove a subsequent promise by the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The court sustained the objection and directed a verdict for the defendant. The general term sustained the judgment entered on the verdict and plaintiff appealed.

D. M. Porter, for appellant.

Cephas Brainerd, for respondent.

ANDREWS, J. The 34th section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. It was held in *Shippy v. Henderson*, 14 Johns. 178, that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the orig-

inal demand, and to reply the new promise in avoidance of the discharge set out in the plea. The court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defense of infancy or the statute of limitations was relied upon. The case of *Shippy v. Henderson* was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. *McNair v. Gilbert*, 3 Wend. 344; *Wait v. Morris*, 6 id. 394; *Fitzgerald v. Alexander*, 19 id. 402.

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defense which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by MARCY, J., in *Depuy v. Swart*, 3 Wend. 139, and is probably the one best supported by authority. But, after as before the decision in that case, the court held that the original demand might be treated as the cause of action, and, for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defense of infancy or the statute of limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. *Esselstyn v. Weeks*, 12 N. Y. 635.

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge, to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

All concur, except FOLGER, J., not voting.

Judgment reversed.

Flike v. The Boston and Albany Railroad Co.

FLIKE v. THE BOSTON AND ALBANY RAILROAD COMPANY,
appellant.

(53 N. Y. 549.)

Master and Servant — liability of corporation for acts of its agents — injury to co-servant.

Defendant's agent, whose duty it was to make up and dispatch trains and to employ and station brakemen thereon, sent out a train without the requisite number of brakemen. The train parted, and in consequence of the want of necessary brakemen, one part collided with another train, killing plaintiff's intestate, who was also a servant of defendant. *Held*, that the defendant was liable, and that it was no defense that the agent had employed necessary brakemen, who failed to appear in time to go upon the train.

Per CHURCH, C. J. A corporation is liable for negligence or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter should be deemed present and consequently liable for the manner in which they are performed.

ACTION by Coonradt Flike as administrator of Henry Sipperly, deceased, to recover under the statute, damages for the death of the intestate through the alleged negligence of the defendant. Judgment was entered on a verdict for the plaintiff, and was affirmed at general term. The defendant appealed.

George W. Miller, for appellants.

Matthew Hale, for respondent.

CHURCH, C. J. The plaintiff's intestate was a fireman upon a freight train upon defendant's road, which left Albany at an early hour on a cold day. Some miles east of Albany eleven cars of another freight train, a short distance in advance, became accidentally detached and ran back and collided with the train on which the deceased was employed, by means of which he was killed. The evidence tended to show that the forward train was deficient in brakemen; that but two were aboard, when there should have been three, which was the usual number; and that if a third brakeman had been there he would have been stationed upon the eleven runaway cars, and with the brakemen on them

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could have controlled their impetus and prevented the accident. The company had at Albany an agent, called a head conductor, whose business it was to make up the morning trains, hire and station the brakemen, and generally to prepare and dispatch these trains.

The general rule that the employer is not liable to one servant or laborer for an injury resulting from the carelessness or negligence of another servant or co-laborer, has been recently so fully considered by this court in the two cases of *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521 ; S. C., 10 Am. Rep. 47, and *Brickner v. The Same*, 49 id. 672, that discussion is unnecessary except as far as may be pertinent to determine its application to the facts of this case. This doctrine was first promulgated in England in 1837, 3 M. & W. 1, in South Carolina in 1841, 1 McCullom, 385, and in Massachusetts in 1842, 4 Metc. 49, and has been adopted in this and most of the other States in the Union. There has been a diversity of reasons given for its adoption, which have led to some confusion in its application. The reasons for the rule are well stated by PRATT, J., in the first case in which it was applied in this State, 6 Barb. 231, and were in substance that the rule *respondeat superior* does not itself spring directly from principles of natural justice and equity, but has been established upon principles of expediency and public policy for the protection of the community ; and that, in view of the unjust consequences which may ensue from its application for injuries by co-servants, the same principles of public policy demand its limitation, and that while the general rule was demanded for the protection of the community, the exception is demanded for the protection of the employer, especially in view of the manner in which the principal business of the country is now transacted. This view evinces the flexibility of the principles of the common law, which are capable of adaptation to new or changed circumstances, and enables courts to adjust the application of the principle, not in obedience to a supposed arbitrary rule, but with such limitations and qualifications as best accord with reason and justice. In applying the rule we should be cautious not to violate the very principles upon which it is founded. While shielding the employer from unjust and burdensome liabilities, we should not withhold all redress from the employed for remissness and carelessness in respect to duties which fairly devolve upon the former as the principal, and over which the latter have no control. In 5 M., H. & G. 352, the court very justly said : " Though we

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have said that a master is not generally responsible to a servant for an injury occasioned by a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servants to unreasonable risks."

The master is liable if his own negligence or want of care produces the injury, and this may be manifested by employing unfit servants or agents, or furnishing improper or unsafe machinery, implements, facilities or materials for the use of the servant. 25 N. Y. 562; 39 id. 468. It was at first doubted by this court whether the exemption should not be limited to injuries by servants whose employment was the same; 1 Seld. 492, per GARDINER, J.; but it has since been repeatedly held that injuries by servants or agents, engaged in the same general business or enterprise, are within the exemption; id. Hence the difficulty of applying the rule in actions against corporations whose whole business can only be transacted by agents who are in some sense co-servants. In 39 N. Y., *supra*, the court decided that a corporation was liable if negligence causing injury to a subordinate servant could be imputed to the directors, but did not establish any definite rule on the subject. The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal.

In the case before us it was clearly the duty of the corporation, in making up and dispatching the advance train, to supply it with suitable machinery and sufficient help for the business and journey which it was about to undertake; and if there was any want of care in these respects, which caused the injury, it is liable. Rockefeller had the general charge of this business, and, within the principle decided in the Laning case, represented the corporation itself.

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It is claimed, by the counsel for the appellant, that the company are not liable, because the agent had, in fact, employed a third brakeman to go upon this train, who, by reason of oversleeping, failed to get aboard in time, and hence, that the injury must be attributed to his negligence, or, if attributable to the negligence of the general agent in not supplying his place with another man, such negligence must be regarded as committed while acting in the capacity of a mere co-servant, within the doctrine of irresponsibility. Neither of these positions is tenable. The hiring of a third brakeman was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly dispatch the train in question, and this duty remained to be performed, although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockefeller cannot be divided up, and a part of them regarded as those of the company, and the other part as those of a co-servant merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible, and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity not warranted by reason or authority. As well might the company be relieved if the train was started without an engineer, or without brakes, or with a defective engine. The same duty rested upon the company, though every man employed had died or run away during the night, and if negligent in discharging it, either by acts of commission or omission whether in employing improper help, or not enough of it, or in not requiring their presence upon the train, it is, upon every just principle, responsible for the consequences. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make the negligence contributory with the brakeman, but would not affect the liability of the company. It is unnecessary, therefore, to inquire whether the sleeping brakeman was so engaged in the common service as that the defendants could be exempted from liability if the injury was solely attributable to his neglect.

Assuming that the facts are, as the jury must have found, the liability of the company is clear. These heavy freight trains were dispatched only five minutes apart, and traversed a very heavy

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grade, and were liable, especially in cold weather, to precisely such accidents as did occur, in which event collisions, with fatal results, were almost certain to ensue. The principal protection in such cases is the prompt and efficient application of the brakes, and the utmost care should be exercised in providing a sufficient number of reliable men to perform this duty. If we were called upon to spell out a contract between the parties, it would be implied that the company agreed to use proper care not to expose the deceased to risks of this character. He was engaged upon another train in the discharge of his duty, and was not only in no way connected with the broken train, but he could neither know of nor provide against the defect.

No authority has been cited which would justify us in relieving the defendant from this liability, nor have I been able to find any. In 8 Cush. 270, the Supreme Court of Massachusetts intimate, although it was unnecessary to decide, that a railroad company is liable for an injury to an employee, caused by a deficiency of help upon another train.

Mr. Redfield, in a note in a recent edition of his work on railways, expresses the opinion that corporations should be regarded as constructively present in all acts performed by their general agents, within the range of their employment; and the tendency of judicial opinion, while it adheres to the general rule of irresponsibility, is against extending it.

The judgment must be affirmed.

PECKHAM, ANDREWS and RAPALLO, JJ., concur.

ALLEN, GROVER and FOLGER, JJ., dissent.

Judgment affirmed.

CHESTER V. DICKERSON, appellant.

(54* N. Y. L.)

Partnerships in reference to lands — Fraudulent acts and representations — Liability of one partner for fraud of copartner.

Defendants entered into a written agreement to purchase, lease, and take refusals of lands on their joint account, and to sell, lease or work the lands so obtained, all losses, expenses, gains and profits to be divided equally among the parties to the agreement. There was evidence that this agreement had previously been in existence by parol. R., one of the defendants, represented to plaintiffs that the lands were oil-producing, whereas the indications of oil had been produced by petroleum poured on the lands through the connivance of J., another of the defendants. R. was cognizant of the fraud, but it did not appear that D., another defendant, knew of it. Plaintiffs purchased the lands, and after discovering the fraud, brought an action against defendants. *Held*, that the agreement entered into by defendants was a partnership and was valid even when existing by parol; also that D. was liable with J. and R. for their fraudulent acts and representations in the transaction of the partnership enterprise.

ACTION brought by Chester and others against Dickerson, Reed, Jones and Dewitt for damages arising from fraud and deceit in the sale of lands. It appeared that in November, 1864, defendants entered into a written agreement whereby they agreed to purchase, lease and take refusals of lands on their joint account, and that they should sell, lease or work the lands thus taken. They further agreed that the expenses and losses, gains and profits, should be shared equally. There was evidence that this agreement had existed by parol from September, 1864. Lands were accordingly taken, and Reed entered into negotiations with plaintiffs, and represented the lands to be oil-producing, showing the indications of oil, which it appeared had been produced by petroleum poured on the lands by one Higgs, through the connivance of Jones. The plaintiffs purchased the lands on the faith of these representations and indications, and the purchase-money was divided among defendants. There was evidence that Reed participated in the fraud, but Dickerson was not implicated by the evidence. Dewitt died pending the

* The cases from 54 New York were decided in the Commission of Appeals which is co-ordinate with the Court of Appeals.

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action. Plaintiffs brought suit against defendants, on discovering the fraud. The court charged that the partnership could exist by parol, and that all the defendants were liable for the fraud committed by either in and about the partnership. The plaintiffs obtained a verdict and judgment. The general term affirmed the judgment, and defendants, Dickerson and Reed, appealed to this court.

James Emott, for appellants. Defendants were not liable for the torts of each other, as are partners in a mercantile firm. *Patterson v. Brewster*, 4 Edw. Ch. 352; *Pitts v. Waugh*, 4 Mass. 424; *Alger v. Raymond*, 7 Bosw. 418; *Coles v. Coles*, 15 Johns. 159; *Stewart v. Mackeney* (E. R.), 6 Eq. Cas. 479; S. C. on appeal (E. R.), 4 Ch. App. 603; *Porter v. McClure*, 15 Wend. 137; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Smith v. Jackson*, 2 Edw. Ch. 28; *Collumb v. Read*, 24 N. Y. 505; *Pierce v. Jackson*, 6 Mass. 245; *Sherwood v. Warnick*, 5 Greenl. 295; *Hutchins v. Turner*, 8 Humph. 415; *Wayland v. Elkins*, 1 Starkie's N. P. R. 272; Collyer on Part., §§ 456-461; Story on Part., §§ 167, 168; *Chamberlain v. Prior*, 2 Keyes, 539; *Fogerty v. Jordan*, 2 Robt. 319. The partnership of defendants in the lands could not exist by parol. Story on Part., § 83; 1 Kent's Com. 173; 3 id. 38; 3 Denio, 125; 4 Edw. Ch. 352; 5 Mass. 424; 7 Bosw. 41; 15 Johns. 159; *Hoxie v. Carr*, 1 Sumn. 173; *Smith v. Burnham*, 3 id. 345.

A. Anthony, for respondents. Partners are jointly and severally liable for the frauds committed by one partner in partnership transactions, although they did not have any connection with, knowledge of, or participation in the frauds. Story on Part., § 108; Collyer on Part. (Perkins' ed.) 401; 25 N. Y. 597; *Durst v. Burton*, 47 id. 167; affirming 2 Lans. 143; *Horn v. Nichols*, 1 Salk. 298; *Chemung Canal Bk. v. Bradner*, 44 N. Y. 680; *Baum v. Mullen*, 47 id. 577; *Elwell v. Chamberlain*, 31 id. 611; *Smith v. Tracy*, 36 id. 79; 13 Wend. 520; *Hawkins v. Appleby*, 2 Sandf. 421; *Manufacturers' Bank v. Gove & Graffon*, 15 Mass. 75; *Willett v. Chambers*, 2 Cow. 814; *Eager v. Barnes*, 31 Beav. 582; *Smith v. Carlton*, 2 Barb. Ch. 336; *Stortswell v. U. S.* 13 Wall. 531. A partner is also liable for false representations of his copartner. *Sweet v. Bradley*, 24 Barb. 549; *Marsh v. Keating*, 1 Scott, 5; *Locke v. Stearns*, 1 Metc. (Mass.) 563; *St. Aubyn v. Smart*, 3 Ch. App. 647; *Patten v. Garney*, 17

Mass. 182; *White v. McGill*, 2 Metc. (Ky.) 262; *Hadfield v. Jamison*, 2 Munf. 66. 67; *Griswold v. Haven*, 25 N. Y. 597; *Crawford v. Willins*, 4 Dall. 268; *Durst v. Burton*, 47 N. Y. 167; *C. C. Bk. v. Bradner*, 44 id. 680. A valid partnership with lands for its object, may be created by parol. *Foster v. Hale*, 5 Vic. 309; *Essex v. Essex*, 20 Beav. 449; *Dale v. Hamilton*, 5 Hare, 369; *Smith v. Tarlton*, 2 Barb. Ch. 336; *Olcott v. Wing*, 4 McLean, 15. A partnership may for months exist by parol, and afterward the partnership agreement be reduced to writing. 1 Man. & G. 155; *Vere v. Ashley*, 10 Barn. & Creswell, 288; 21 Eng. C. L. 127; *Foster v. Hale*, 5 Vesey, 309; *Essex v. Essex*, 20 Beav. 449; *Dale v. Hamilton*, 5 Hern. 369; affirmed, 2 Ph. 266. Dickerson having shared in the proceeds of the sale to plaintiffs, is chargeable with a ratification of the fraud, even though ignorant of the facts. *Bennett v. Judson*, 21 N. Y. 238; *Elwell v. Chamberlain*, 31 id. 611; *Doggett v. Emmerson*, 3 Story, 700; *Brass v. Worth*, 40 Barb. 654; *Smith v. Tracy*, 36 N. Y. 79.

EARL, C. It cannot be questioned that two or more persons may become partners in buying and selling land. There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. Story on Part., §§ 82, 83; Collyer on Part., §§ 3, 51, and note; *Dudley v. Littlefield*, 21 Me. 418; *Sage v. Sherman*, 2 N. Y. 417; *Mead v. Shepard*, 54 Barb. 474; *Pendleton v. Wambersiu*, 4 Cranch, 73; *Thompson v. Bowman*, 6 Wall. 316; *Hoxie v. Carr*, 1 Sumner, 173. KENT says, "a partnership is a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and share the loss in certain proportions; and that it is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage-coaches, artisans or farmers, as well as between merchants and bankers." 3 Kent's Com. 24, 28; and why may it not exist between dealers and speculators in real estate?

But, as it is claimed that the partnership in this case existed by parol before the execution of the written agreement, dated November 28, 1864, it is necessary to inquire whether a partnership, in reference to lands, can be formed and proved by parol. Upon this question there is considerable conflict in the authorities. On the

one hand it is claimed that a parol agreement for such a partnership would be within the statute of frauds which provides that no estate or interest in lands shall be created, assigned or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning or declaring the same; and to this effect is the case of *Smith v. Burnham*, 3 Sumner, 345. On the other hand it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute of frauds; and to this effect are the following authorities: *Dale v. Hamilton*, 5 Hare, 369; *Essex v. Essex*, 20 Beavan, 449; *Bunnell v. Taintor*, 4 Conn. 568. A full discussion of the question is found in *Dale v. Hamilton*; and the reasoning and review of the cases there by Vice-Chancellor WAGRAM are quite satisfactory. The general doctrine is there laid down that "a partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale and selling lands may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing." I am inclined to think this doctrine to be founded upon the best reason and the most authority. But whether it is or not, it is not very important to decide in this case. Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and

buy, improve and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an estate in lands without a writing. If there was a parol agreement in this case before the written one, it was just like the one embodied in the writing, to wit, a partnership to purchase, lease and take refusals of land and then sell, lease or work them for the joint benefit of the parties. This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief.

We then come to the question whether there was sufficient proof of the existence of this partnership by parol before the 28th of November, 1864, and I cannot doubt that there was. Jones distinctly testified that the partnership between all the defendants did exist as early as September, and that it was afterward put into writing. Neither Reed nor Dickerson, in their testimony, denied this, and neither of them claimed that they did not become partners until the writing was executed. There is abundant evidence that Reed was associated with Jones as early as the latter part of September, or the fore part of October. It does not appear how or by what negotiation the members of the firm were brought together in partnership, and it does not appear through what agency Dickerson was induced to join with the others. As to him, all we have is the evidence of Jones, above referred to, and the writing, and the fact that he, subsequently, without objection, in the division of the money received from the plaintiffs, allowed his share of the sums paid for the services of Higgs, who was employed to pour oil upon the lands, from some time about the 1st of September. Hence, we must take it as proved, in this case, that this partnership existed as early as September, 1864. But it is claimed, on the part of the appellants, that all the rules of commercial partnerships do not apply to a partnership in real estate. They apply to every other kind of partnerships, and why not to this? This kind of partnership is formed like every other, for the mutual profit and advantage of the

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parties, and there is no reason why it should not be governed by the same rules.

In all partnerships one partner is the general agent of all the partners for the transaction of all the partnership business, and I can perceive no reason for not applying the same rule of agency to partnerships in real estate. In fact, all the powers, duties and rights which usually appertain to partnerships, must appertain to partnerships in real estate, except as they are modified by the character of the property; and the only difference grows out of the rules of law in reference to the conveyance and transmission of real estate. One partner cannot convey the whole title to real estate unless the whole title is vested in him. *Van Brunt v. Applegate*, 44 N. Y. 544. But he can enter into an executory contract to convey, which a court of equity will enforce. While a contract for the conveyance of land must be in writing, yet an agent to execute the contract may be appointed by parol. Willard on Real Estate, 376. And hence, when the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate. I find no authority holding that the rules of ordinary commercial partnership do not apply to partnerships in real estate, except the case of *Pitts v. Waugh*, 4 Mass. 424. It was there held that the law merchant respecting dormant partners did not extend to speculators in land. The learned judge writing the opinion did not cite any authority for the decision he made, and his reasons for the conclusions which he reached are not satisfactory.

Dormant partners are held liable for the debts and contracts of the firm, because they are, in fact, members of the firm, and share in its profits, and the law will not allow them secretly to share in the profits of the firm without taking their share of the risks and bearing their share of the losses, as to third persons. And there is precisely the same reasons for holding a dormant partner in a real estate partnership liable to all persons dealing with the firm. In *Patterson v. Brewster*, 4 Ed. Ch. 322, the vice-chancellor expressed the opinion that the law merchant does not apply to partners in buying and selling land. This case and *Pitts v. Waugh* are commented on by Judge MITCHELL in *Bemus v. Harrison*, 19 Barb. 53, and are there shown not to be precise authority for the doctrines announced. It follows, therefore, that the court committed no error in holding that all the partners were liable for the

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frauds committed by either in the transaction and prosecution of the partnership enterprise, for it is well settled that the firm is bound for the fraud committed by one partner in the course of the transactions and business of the partnership, even when the other partners have not the slightest connection with, or knowledge of, or participation in the fraud. Story on Part., § 108; Collyer on Part., § 445; *Griswold v. Haven*, 25 N. Y. 595.

[The remainder of the opinion is unimportant.]

Judgment affirmed.

ATLANTIC DOCK COMPANY V. LEAVITT, appellant.

(54 N. Y. 85.)

Deed — liability of grantee in deed poll — effect of covenant.

Plaintiff conveyed to W. land by warranty deed, signed only by plaintiff. The deed contained a covenant on behalf of W. and his heirs and assigns that they would not erect upon the land any distillery. A portion of the land came into possession of defendants through various conveyances. Defendants' deed did not contain the covenant against building a distillery, and they subsequently erected one. *Held*, that an action would lie by plaintiff to restrain defendants from using the distillery. The covenant bound W. and his assigns, although he did not sign the deed from plaintiff to him.

ACTION by the Atlantic Dock Company against Charles F. Leavitt and others to restrain defendants from using certain premises as a distillery for the manufacture of resin oil. In 1852 plaintiff conveyed certain lots of land in Brooklyn to one Worcester by warranty deed, signed only by plaintiff. The deed contained the following clause: "And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant with the said Atlantic Dock Company and their successors that neither the said party of the second part nor his heirs or assigns shall or will at any time hereafter erect upon any part of said lots any brewery, distillery, slaughter-house, or other noxious or dangerous trade or business." Defendants, through various conveyances, came into possession of five of these lots, being the premises in question, and on which they erected and used the distillery. Defendants' deed

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was a warranty deed, with full covenants, not containing the clause in regard to the erection of a distillery, etc. Plaintiff obtained a judgment at special term and the general term sustained the judgment. Defendants appealed to this court.

Charles E. Soule, for appellants. The deed to Worcester was not signed by him, and he was not bound by the covenants therein. *Trustees of Hocking Co. v. Spencer*, 7 Ohio St. 2, 149; Whart. L. D., "Covenant;" *Gale v. Nixon*, 6 Cow. 448; *Hinsdale v. Humphrey*, 15 Conn. 531; Platt on Co. 18; 2 Co. Lit., by Thomas, 187; *Burnett v. Lynch*, 5 B. & O. 589; *Torrey v. Bk. of Orleans*, 9 Paige, 649; *Blyer v. Molhalland*, 2 Sand. Ch. 478; *Rawson v. Copland*, 2 id. 251; *Trotter v. Hughes*, 2 Kern. 78; *Halsey v. Reed*, 9 Paige, 446; *Curtis v. Tayler*, id. 436; *Ferris v. Crawford*, 2 Den. 595; *King v. Whitby*, 10 Paige, 465; *Belmont v. Coman*, 22 N. Y. 436; *Burr v. Beers*, 24 id. 278; *Ricard v. Sanderson*, 41 id. 179; *Bower v. Bell*, 20 Johns. 338; *Garnsey v. Rogers*, 47 N. Y. 233.

Samuel Hand, for respondents.

EARL, C. While the distillery used for the manufacture of resin oil was probably not such a *distillery* as was contemplated by the parties to the deed, yet the court found, upon sufficient evidence, that the business was dangerous within the meaning of the covenants contained in the deed, and that was sufficient to show a breach thereof. *The Atlantic Dock Co. v. Libby*, 45 N. Y. 499. The main question therefore to be determined is, whether the covenant in the deed to Worcester bound him, although he did not sign and seal the deed. I entertain no doubt that it did.

I have found no authority holding that the grantee in such a deed, a deed-poll, is not bound by the covenants therein mentioned to be performed by him in some form. It has, however, been held in some cases that the technical action of covenant could not be maintained against such a grantee, because he had not sealed the deed. *Hinsdale v. Humphrey*, 15 Conn. 432; *Burnett v. Lynch*, 5 Barn. & Cress. 589; *Maule v. Weaver*, 7 Penn. 329; Platt on Cov. 18.* But I apprehend that the preponderance of authority is the other way. Platt, after reviewing the cases and laying down the law as he claims it to be, says: "Perhaps, however, the doctrine

* So held in *Johnson v. Muzzey*, 45 Vt. 419; 12 Am. Rep. 214.

has been too long sanctioned (that such an action can be maintained) to be now reversed. At all events, it is an introduction of an equitable principle into a court of law; the acceptance of a deed being considered equivalent to an actual execution by the lessee." It was said, in *Rogers v. Eagle Fire Co.*, 9 Wend. 618, that "whoever takes an estate under a deed ought, in reason and equity, to be obliged to take it under the terms expressed in the deed." In Comyn's Digest (title "Covenant," A. 1), it is said that "if a lease be to A and B by indenture, and A seals a counterpart and B agrees to the lease but does not seal, yet B may be charged for a covenant broken." In *Trotter v. Hughes*, 12 N. Y. 74, Judge DENIO says: "The acceptance of a conveyance containing a statement that the grantee is to pay off an incumbrance, binds him as effectually as though the deed had been *inter partes* and had been executed by both grantor and grantee." In *Belmont v. Coman*, 22 N. Y. 438, Judge COMSTOCK says: "It needs no authority to prove that if in the conveyance there are words importing that the grantee will pay the debt, he is deemed to have entered into an express undertaking to do so, although he does not sign or seal the instrument. The acceptance of a deed containing such language is evidence of the most satisfactory kind that he has promised to do what the deed says he is to do." In *Spaulding v. Hallenbeck*, 35 N. Y. 206, it is said that "the grantee having accepted the deed and taken possession under it, is bound by the covenants therein contained, as effectually as if he had signed them." In Greenleaf's Cruise Digest (chapter 26, title 32, section 3), it is said that "a covenant can only be created by deed, but it may be as well by deed-poll as by indenture; for the covenantee's acceptance of the deed is such an assent to the agreement as will render it binding on him. But the party must be named in the deed-poll." In Sheppard's Touchstone, 177, it is said "if feoffment or lease be made to two, and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, and he that doth not seal doth notwithstanding, accept of the estate and occupy the lands conveyed or demised, in these cases as touching all inherent covenants, they are bound by these covenants as much as if they do seal the deed." See to the same effect 2 Hill. on Real Property, 325 and note, and 364; 3 Wash. on Real Property (3d ed.), 280; *Finlay v. Simpson*, 2 N. J. 311, 332. I find in none of these authorities any discussion of the

principle upon which the liability of the grantee upon covenants in a deed-poll is based. It is said that the grantee becomes bound by the acceptance of the deed and enjoyment of the estate conveyed.

It is undoubtedly true that a seal is essential to a covenant, and that an action of covenant can be based only upon an agreement in writing under seal. In the case of a deed-poll containing covenants to be performed by the grantee, the grantee who has induced the grantor to give the deed in reliance upon the covenants, and who has accepted the deed and enjoyed the estate granted, is estopped from denying his covenants. He is estopped from denying that the seal attached to the deed is his as well as that of the grantor, and hence when sued upon his covenants the proof of the deed and of his acceptance thereof and enjoyment of the estate, conclusively establishes that he has covenanted as stated in the deed. The chancellor, in *Torrey v. Bank of Orleans*, 9 Paige, 649, says "a recital of a fact in a deed, is as against the grantee in such deed, and all persons claiming under him through that deed, evidence of the fact recited therein, so as to save the necessity of further proof thereof by the grantor or those who claim under him." The acceptance of the deed operates as an estoppel upon the grantee and those who claim under him, as against the grantor and his assigns or representatives. In *Sinclair v. Jackson*, 8 Cow. 585, Chancellor JONES says: "A man who admits a fact or deed in general terms, either by reciting it in an instrument executed by him or by acting under it, shall not be received to deny its existence." And such estoppels run with the land into whose hands soever it comes. *Porterfield, Ex'rs v. Clark*, 2 How. (U. S.) 109.

But, from the form of the attestation clause in the deed to Worcester, I think we must hold that he actually sealed the deed. It is as follows: "In witness whereof the parties hereto of the first part have caused their corporate seal to be hereunto affixed and these presents to be signed by their president, and the *said party of the second part hath hereto* set his hand and seal the day and year first above written." Here is an express acknowledgment by the grantee in the deed, which he accepted and under which he took and held the premises granted, that he had sealed the deed. Can he or those who hold under him be now heard to say that he did not seal it? The deed had a seal affixed, and it is well settled that the several persons who execute a sealed instrument may use or adopt the same seal. *Ludlow v. Simond*, 2 Caines' Cas. in Error, 1, 7,

42, 55 ; *Macay v. Bloodgood*, 9 Johns. 285 ; *Van Alstyne v. Van-Slyck*, 10 Barb. 383.

Where two persons execute a sealed instrument, and the seal is placed opposite the name of one, it must be shown that the other adopted the same seal, but this may be shown by any competent evidence; and here we have an express acknowledgment of the grantee. It matters not that the grantee did not subscribe the deed with his name. This is not essential to a sealed instrument. All that is essential is that a party should execute it by sealing it as his instrument. The seal makes it his deed or specialty. It is the statute alone that requires a deed for the conveyance of land to be signed as well as sealed by the grantee. In Coke upon Littleton, 230 b, etc., it is said, if mention be made in the deed "that the grantor only hath put his seal and not the grantee, then is the indenture only the deed of the grantor. But when mention is made that the grantee hath put his seal to the indenture, etc., then is the indenture as well the deed of the grantee as the deed of the grantor." The case of *Maul v. Weaver*, *supra*, is adverse to these views. In that case the grantor alone signed the deed, and there was but one seal opposite to his name. The attestation clause was as follows : "In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written." The deed contained covenants to be performed by the grantee, and in an action of covenant it was held that the grantee was not liable because he had not sealed the deed. Chief Justice GIBSON, in writing the opinion of the court, says, in substance, that subscribing the deed by the grantee was not essential, and was only important as authenticating the seal; and that when but one of the parties subscribed opposite the only seal, the presumption was that he alone sealed, and that in order to bind the other party by the seal there must be some evidence to overcome this presumption, and to show that he also adopted the seal, and he held that the recital in the deed, that both parties had sealed, was not sufficient to overcome this presumption. I cannot concur in this conclusion. I think the recital in the deed which the grantee takes and holds, and under which he enjoys the estate granted, furnishes the most satisfactory evidence that he has adopted the seal, and I am also of opinion that he is estopped from denying that the recital is true.

I have thus far discussed this case upon the theory assumed by the counsel for the appellant, that it was necessary for the plaintiff

to maintain that Worcester, plaintiff's grantee; was bound by the covenant contained in the deed as a sealed covenant in such a sense that an action at law upon the covenant as such could be maintained against him for any breach thereof. Upon this theory it was a covenant running with the land, and it is not disputed that this action is maintainable. But if I am wrong in all this, I find no authority against the maintenance of *this* action to restrain the defendants from doing what plaintiff's grantee, under whom they hold, agreed he would not do. All the authorities agree that some form of action, either in assumpsit, case or equity, can be maintained. If the action were against Worcester, I am unable to see any objection to its maintenance. He would be held bound by the agreement contained in the deed which he accepted. The deed would be held to be evidence that he had made the agreement therein contained. And upon the theory that it was not an agreement on his part under seal, he could have been sued for any breach of it in what was formerly called an action of assumpsit or an action on the case; and a court of equity would restrain him from doing what he had agreed not to do. The agreement qualified the estate which he took and attached itself to that estate. He contracted for himself and assigns; and when the defendants took the premises they were charged with notice of this agreement contained in the deed, through which they derive their title. They must be deemed to have assented to it, and are bound by it just as if they had made it with the plaintiff. In *Tallmadge v. East River Bank*, 2 Duer, 615, a very learned court held that a parol agreement, partly executed, not appearing in the deed, made by a grantee not to build out to the street on the land conveyed to him, was so far binding upon those holding under him that they would be restrained from violating the agreement. And Platt, in his work above cited, seems to concede that a court of equity might enforce against a grantee a covenant contained in a deed-poll, although an action of covenant could not be maintained.

I have not overlooked other points taken by counsel for the appellants. It is sufficient to say of them that they furnish no reason for a reversal of the judgment.

The judgment must therefore be affirmed, with costs.

All concur.

Judgment affirmed.

HUBBARD V. MATTHEWS, appellant.

(54 N. Y. 43.)

Promissory note — notice of protest. Effect of war on partnership liabilities. Indorsement.

Defendant, a member of a firm doing business in New Orleans, indorsed the firm name on certain notes. Defendant resided in New York and while there the war of the rebellion broke out. The other members of the firm continued business in New Orleans and the notes on coming due were presented at the firm's place of business where they were made payable and protested for non-payment. Notices of protest were served at the same place, part of the notices being served personally on B. whom defendant had constituted his agent before the war. *Held*, that defendant was not discharged from liability as indorser. The notices of protest were properly served, although by virtue of the existence of the war the partnership was dissolved.

It seems that a prior indorser may recover against a subsequent indorser on proof of the proper intent of the parties.

ACTION by Charles D. Hubbard against Edward Matthews, impleaded, etc., to recover on a contract of indorsement. In 1860 plaintiff was a member of the firm of Brander & Hubbard in New Orleans. This firm dissolved and defendant purchased plaintiff's interest, and a new firm was formed under the name of Brander, Chambliss & Co., defendant being a member. Defendant gave Hubbard, in part payment of his interest, certain notes of the firm of Brander & Hubbard, which had been partitioned to Brander, Sr., and by him loaned to defendant to make the purchase. Defendant indorsed the name of the new firm on these notes. The new firm conducted business as the successors of the old firm, occupying the same place of business. Defendant was a resident of New York, and while at his home, the war of the rebellion broke out. When the notes came due they were presented for payment at the place of business of Brander, Chambliss & Co., and protested for non-payment. Notices of protest were served at the same place. Two of the notices were served on one Burke on whom defendant had, before leaving New Orleans, conferred power of attorney to acknowledge protest of bills, etc. The remaining facts appear in the opinion. The appeal is by defendant.

John K. Porter, for appellant. The contract of indorsement was dissolved by the war. 2 Kent, 55-59; 3 id. 67. *The Wm. Bagley*, 5 Wall.

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407; *The Prize Cases*, 2 Black. 667, 687; *The Venice*, 2 Wall. 274; *Griswold v. Waddington*, 16 Johns. 438. After dissolution of firm, notice of protest of a note must be given to each partner. 3 Kent, 63; Bailey on Bills, 285, ch. 7, § 2; Collyer on Part., §§ 544-5; *Willis v. Green*, 5 Hill, 234; *Shepard v. Hawley*, 1 Conn. 367; *Sayer v. Frick*, 7 Watts, 383.

Luther R. Marsh, for respondent. Notice of the dishonor of a note indorsed by a firm given to one of the partners, either before or after dissolution, binds all. *Wheeler v. Maillot*, 20 La. An. 75; *Gowan v. Jackson*, 20 Johns. 176-179; *Willis v. Green*, 5 Hill, 232, 234; Pars. Part. 380, 386; *Beardsley v. Hall*, 36 Conn. 270; 4 Am. R. 74; *Bissell v. Adams*, 35 id. 299; *Murray v. Mumford*, 6 Cow. 441, 442; *Wood v. Bradick*, 1 Taunt. 104; *Griswold v. Waddington*, 1 Johns. 438, 493, 494; Coll. on Part., § 121; 3 Kent, 57 (marg.); *Buchanan v. Curry*, 19 Johns. 137, 142, 143; Edwards on Bills, 632, note 3; *Brown v. Turner*, 15 Ala. 832; *Costar v. Thomanson*, 19 id. 717-727; *Dabney v. Stidger*, 4 Sm. & M. 749; *Darling v. March*, 22 Me. 184; *Slocumb v. Lizardi*, 21 La. An. 355, 359; *Nott v. Douming*, 6 La. 684; *White v. Kearney*, 2 La. An. 639, 641; *Butchart v. Dresser*, 10 Haro, 453; 4 De G. M. & G. 542.

JOHNSON, C. The indorsements upon which this action is brought were made on the 27th or 28th of March, 1861, at New Orleans, and therefore at a period earlier than the breaking out of hostilities in the late civil war. They were made by the defendant Matthews, then present at New Orleans, in the name of Brander, Chambliss & Co., and he therefore cannot be allowed to dispute either the existence of that firm or his responsibility as a member of it. It actually proceeded to transact business for a considerable period. By the writing under which it was constituted it was to commence on the 27th of March, 1861, and it did so. The writing provided that a copy should be immediately transmitted to Brander, Senior, for his approval; and that, in case of his refusal, it should become null and void. This, in my opinion, looks to an affirmative act of dissent on his part, until the happening of which the affairs of the firm would go on with the effect, at least, to bind the other and assenting partners. To this effect are the decisions of the Court of Appeals in *Bank of New Orleans v. Matthews*, 49 N. Y. 12, and *McStea v. Matthews*, 50 id. 166, in each of which the court had before it the instrument above referred to.

The indorsements were made to transfer the notes to the plaintiff and to give him recourse against the firm of Brander, Chambliss & Co., in case of their non-payment. They had formed a part of the assets of Brander & Hubbard, which firm, by agreement, was dissolved on the day of the formation of the firm of Brander, Chambliss & Co. For the interest of the plaintiff Hubbard in the firm of Brander & Hubbard, Matthews, to whom that interest was sold, was to pay Hubbard \$35,000. In part payment of this sum, Matthews indorsed, in the name of Brander, Chambliss & Co., the notes in question to Hubbard, in order to give to him the responsibility of the new firm upon these notes in place of cash. If it be conceded that any difficulty might stand in the way of the plaintiff, were he now seeking to charge the other members of the firm of Brander, Chambliss & Co., Matthews can interpose no objection; for he was the actor in the whole matter and cannot be permitted to deny his own authority in order to protect himself from liability. Nor, since the case of *Moore v. Cross*, 19 N. Y. 227, can there be any difficulty in Hubbard, the indorser of Brander, Chambliss & Co., recovering against them, growing out of the fact that the firm name of Brander & Hubbard appears upon the paper before them. The intent of the parties in this respect can be carried out by the courts. *Bacon v. Burnham*, 37 N. Y. 614.

The more important question in the case is, whether Matthews was charged as indorser. All the notes were payable at the counting house of Brander & Hubbard, in New Orleans. Upon its dissolution the new firm of Brander, Chambliss & Co. carried on its business at the same place, and continued to do so until after the maturity of the notes. On the 26th of April, 1861, Matthews, in New Orleans, constituted one Glendy Burke attorney in fact for himself, and also for the firm of Brander, Chambliss & Co., among other things, to receive and acknowledge all notices of protest for the firm or for himself. Burke, who had been and continued the chief clerk of the defendants, remained in New Orleans in attendance on the business of the defendants, his place of business being their counting house. Matthews, whose residence was in New York, returned to that place soon after the execution of the powers of attorney. Before the maturity of any of the notes the civil war broke out and was flagrant between the United States and the so-called Confederate States. During its continuance all the notes matured and were duly presented for payment, and notice of their

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dishonor was given in due time at the office of the defendants, addressed to the firm. The question is, were these notices sufficient to charge Matthews, who was then in New York? He in New York and the other members of the firm in New Orleans by the mere fact of war, had become enemies to each other, their relation of partners had been dissolved, and all commercial intercourse between them had become unlawful. *Griswold v. Waddington*, 16 Johns. 438; *Woods v. Wilder*, 43 N. Y. 164; 3 Am. Rep. 684; *The William Bagley*, 5 Wall. 377; *Kershaw v. Kelsey*, 100 Mass. 561; 1 Am. Rep. 142. But neither had undergone, by the mere fact of war, a forfeiture of any existing rights of property, nor been exonerated from any existing liabilities. Neither could maintain an action in the courts of the other party to the war while it should last, but the disability would terminate with the war itself. *Levy v. Stewart*, 11 Wall. 244, 255. In the language of Chancellor KENT, in *Griswold v. Waddington*, above cited, "the parties were still partners as to those goods which had been actually purchased by them before the war; and the parties, as partners, were bound to account to each other for the proceeds of these goods, and equally bound as partners to pay for them, if not already paid for. A dissolution of partnership only has respect to the future. The parties remain bound for all antecedent engagements. The partnership may be said to continue as to every thing that is past and until all pre-existing matters are wound up and settled."

The notes in question were held in New Orleans, were payable there; and being unpaid there by the makers, might be paid by the indorsers who were there carrying on business; and such payment, if made, could have been brought into account with Matthews, after the close of the war, in conformity with the case above cited; for it obviously could be no defense to the other partners domiciled in New Orleans if sued by the holders in the courts of the locality during the war, to say that an enemy domiciled in New York was an indorser with them as partners. Nor is there any authority or reason for holding that any different notice to the firm in New Orleans was necessary by reason of the dissolution by force of the war, in order to charge the members of the firm domiciled there. If the case of parties so situated be likened to that of persons not partners who jointly indorse, the result would be that neither could be charged, because, as to them, each must have separate notice, and

neither is liable without the other is also charged. *Willis v. Green*, 5 Hill, 232; *Shepard v. Hawley*, 1 Conn. 367. That rule would require, in order to charge the members of the indorsing firm resident in the territory of one belligerent, a communication, or an attempt to communicate, with an enemy resident in the territory of the other belligerent, which would fall under the prohibition of all commercial intercourse between the citizens of belligerents. It results then from necessity if the liability of the absent partner in a firm dissolved by the event of war is to be continued at all in respect to engagements existing at the time when war breaks out, that he must be deemed to be represented by the representative of the firm remaining within the jurisdiction of the belligerent whose authority extends over the place of business of the firm, and that, as in respect to property and rights there existing, so in respect to obligations and liabilities created before the war, he must share the fortunes of the firm. Such a rule does not seem to conflict with any public interests, nor with any determination to which we have been referred. It agrees with the decisions in respect to the effect of dissolutions of partnership by consent of parties. Thus, in *Brown v. Turner*, 15 Ala. (N. S.) 832, it was held that a demand of payment of one was a demand of all; and it was said that a dissolution of partnership, before a bill falls due, cannot vary the rule, nor render it necessary that a separate demand should be made of each. In *Coster v. Thomason*, 19 Ala. (N. S.) 717, the court says: "We believe the law to be well established that where a bill indorsed by a partnership is dishonored, notice to either of the late partners is sufficient to bind all." So, in *Slocumb v. Lizardi*, 21 La. An. 355, it was held that notice to one member of a firm, indorsers of a note, is notice to all. In that case the dissolution was by death, and notice to the survivor was held to bind the estate of the deceased partner. In *White v. Kearney*, 2 La. An. 639, goods had been contracted for by a firm, and after its dissolution were offered to be delivered to one of the former partners, and it was held sufficient to put the firm in fault, he refusing to receive and pay for them. The only case to which we have been referred suggesting a doubt upon the generality of the rule is that of *Nott v. Douming*, 6 La. 684, in which the circumstance existed and is remarked that the notice of dishonor was given to one partner before notice of dissolution had been received by the creditor. All these cases, by their reason, tend to illustrate the ground of and to sustain the rule well stated in Edwards on Bills and Promissory notes (page

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632, note 3), that the dissolution cannot retroact on the contract of indorsement, under which notice to one of the partners affects all.

The same conclusion would result from the agency of Burke constituted by the defendants, then in New Orleans, and before the breaking out of the war and the general legal interruption of commercial intercourse, as defined in *McStea v. Matthews*, before referred to. To receive and acknowledge notice of protest was a power specially conferred upon him; and all the notices were delivered at his place of business in due time, and some to him personally.

The doctrine that an agent constituted before a war may continue to represent his principal in transactions not contrary to the policy or interests of the government of the agent's residence, though the principal be an enemy resident under the hostile government, seems to have been often affirmed; several times acted upon by the courts, and never, that I have found, denied. In *United States v. Grossmayer*, 9 Wall. 72, Mr. Justice DAVIS, delivering the opinion of the Supreme Court of the United States, says: "We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it; but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose, after hostilities have actually commenced; and to this effect are all the authorities.

The same principle is recognized in *Ward v. Smith*, 7 Wall. 452; *Conn v. Penn*, 1 Peters' Cir. O. 496, 524; *Denniston v. Imbrie*, 3 Wash. O. C. 396, 403; *Paul v. Christie*, 4 Harris & McH. 161; *Robinson v. International Life Ins Co.*, 42 N. Y. 54, 62; 1 Am. Rep. 490; and also in the earlier cases in this State of *Buchanan v. Carry*, 19 Johns. 137, 141; *Griswold v. Waddington*, 16 id. 384; *Clark v. Morey*, 10 id. 69, 73. Moneys received by such an agent are lawfully paid and lawfully received though a remittance by him to his enemy principal would be unlawful. If such an agency can exist at all for any purpose, it is not perceived why, being lawfully constituted in its beginning, it may not subsist for any purpose not hostile, and especially for such a purpose as to receive notices of dishonor upon notes in order to charge an absent indorser.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Pelton v. Rensselaer and Saratoga Railroad Co.

PELTON, appellant, v. RENSSELAER AND SARATOGA RAILROAD
COMPANY.

(54 N. Y. 214.)

Common carrier — termination of liability — notice to consignee.

Plaintiff, a resident of Michigan, on removing to G. in New York, four miles from S., delivered goods to a railroad company, directed to plaintiff at S. The goods arrived at S. over defendant's railroad, but no one was present to receive them. They were then removed into defendant's warehouse, where at the end of three days they were consumed by fire, without defendant's fault. The agent in charge of the warehouse had made inquiries in regard to the residence or whereabouts of plaintiff, but could obtain no information. It appeared that previous to the arrival of the goods plaintiff called for them but gave no information as to place of residence or address. *Held*, that plaintiff ought to have given such information to defendant, before the arrival of the goods, as would have enabled defendant to give the requisite notice to plaintiff, that defendant's liability as common carrier had been changed to that of warehouseman, and plaintiff could not recover for the loss. (*See note, p. 569.*)

ACTION by Emily Pelton against the Rensselaer and Saratoga Railroad Company, to recover for the loss of certain goods transported over defendant's route. It appeared that in April, 1870, plaintiff was a resident of Michigan, but afterward in the same month removed to Greenfield, four miles from Saratoga Springs, New York. At the date of her removal she delivered to the Michigan Central Railroad goods consigned to "Emily Pelton, Saratoga Springs, N. Y.," to be transported to that place by railroad. The goods arrived in Saratoga Springs over defendant's railroad, but no one was present to receive them on behalf of plaintiff, and they were deposited in defendant's warehouse, where they remained for three days, when they were consumed by fire, without the fault of defendant. The agent in charge of the warehouse inquired of the draymen in attendance as to plaintiff's residence or whereabouts, but could obtain no information. Previous to the arrival of the goods, plaintiff called for them, but gave no information to defendant's agents as to her place of residence or post-office address. Judgment was ordered for defendant, and it was affirmed at general term. Plaintiff appealed to this court.

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John W. Eighmy, for appellant.

John B. Gale, for respondent.

GRAY, C. The plaintiff to whom the goods consumed by fire were consigned, had, within about sixteen days of the time of their arrival at Saratoga Springs, the place of their destination, removed to a place four miles distant therefrom, up to which time she had resided in Michigan. When the goods arrived, no one was present to receive them, or to whom to give notice of their arrival, and her residence was unknown to the defendant; the goods were removed from the car to the defendant's warehouse, and there kept three days, when, without the defendant's fault, they were consumed by fire. During each of these days, the defendant's agent, having charge of the warehouse, inquired of persons as likely as any others to know the defendant's residence or whereabouts, and gained no information on the subject. This, within the case of *Northrop v. The Syracuse & B. N. Y. R. R. Co.*, 3 Abb. Ct. App. Dec. 386, was an abundant excuse for not giving notice, and within that case, in other respects, and the rule as stated in *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505, 511; 4 Am. Rep. 709. The defendant's character had, before the fire, changed to that of a warehouseman, and the goods having been destroyed, without the defendant's fault, the plaintiff cannot recover, where the residence of the consignee claiming the right to notice is not known at the freight depot.

The consignee ought, before the arrival of the goods, to give such information as will enable the carrier to give the requisite notice, but whether if such notice had been given it would have become their duty to have notified the plaintiff, whose post-office address was beyond the municipality of the depot, is not involved.

Judgment should be affirmed.

NOTE. — See note to *Mobile and Girard Railroad Co. v. Prewitt*, 7 Am. Rep. 591, wherein the cases are collated. — REP.

SPOONER, appellant, v. BROOKLYN CITY RAILROAD COMPANY.

(54 N. Y. 230.)

Carrier of passengers. Collision—contributory negligence.

Plaintiff was a passenger in a stage sleigh used by defendant, a city railroad company, in consequence of a snow storm which had obstructed the track so that cars could not run. The sleigh was furnished with foot-boards or fenders, on which plaintiff was riding, the inside of the sleigh being full. Passengers were allowed to ride in this position, and their fares were taken without objection. Plaintiff was injured while so riding, by collision of another sleigh with the stage sleigh. *Held*, that plaintiff was not guilty of contributory negligence *per se*; and that where the driver of the stage sleigh was negligent, the negligence of the driver of the other sleigh would not relieve defendant from responsibility for the injury to plaintiff.

ACTION by Edwin B. Spooner against the Brooklyn City Railroad Company to recover for injuries received by plaintiff while a passenger on defendant's route. It appeared that defendant was using a stage sleigh for the accommodation of passengers, in consequence of a heavy fall of snow which obstructed the track so that cars could not run. Plaintiff was riding on a fender or guard, the inside of the sleigh being full. A collision occurred between the stage sleigh and a coal sleigh, whereby plaintiff was injured. The remaining facts appear in the opinion. The plaintiff was nonsuited. Judgment in favor of defendant was affirmed at general term; and plaintiff appealed to this court.

Joshua M. Van Cott, for appellant, cited *Alden v. R. R. Co.*, 26 N. Y. 102; *Willis v. R. R. Co.*, 34 id. 670; *Ferris v. Union F. Co.*, 36 id. 312; *McIntyre v. R. R. Co.*, 37 id. 287; *Helbert v. R. R. Co.*, 40 id. 146; *Haley v. Earle*, 30 id. 208; *Hegan v. R. R. Co.*, 15 id. 380, 383.

Geo. G. Reynolds, for respondent. Plaintiff must show affirmatively that he was not guilty of any negligence contributing to the injury. *Deyo v. N. Y. C. R. R. Co.*, 34 N. Y. 9; *Grippen v. N. Y. C. R. R. Co.*, 40 id. 34, 49, 51. A carrier of passengers is not an insurer against the negligence and imprudence of the passengers. *Bowen v. N. Y. C. R. R. Co.*, 18 N. Y. 408; *McFadden v. N. Y. C.*

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R. R. Co., 44 id. 478; *Hickey v. B. & L. R. R. Co.*, 14 Al. 429, 432; *Treagear v. Dry Dock, etc., Co.*, N. Y. Com. Pls. ; *Spooner v. Brooklyn City R. R. Co.*, 31 Barb. 427. Upon an uncontroverted state of facts the negligence is always a question of law. *Gonzales v. N. Y. & H. R. R. Co.*, 38 N. Y. 440; *Harper v. Erie R. R. Co.*, 3 Broom (32 N. J.), 98; *Pitts., etc., R. R. Co., v. McClurg*, 56 Penn. 294; *Garrett v. Man., etc., R. R. Co.*, 16 Gray, 501; *Cotton v. Wood*, 8 C. B. (N. S.) 572; S. C., 98 E. C. L. 566; *Solomon v. Central Park, etc., R. R. Co.*, 1 Sweeney, 298; *Wilcox v. R. & W. R. R. Co.*, 39 N. H. 336. The nonsuit in this case was proper. *Johnson v. H. R. R. R. Co.*, 20 N. Y. 73; *Wild's Case*, 24 id. 430; S. C., 29 id. 315; *Sheldon v. Hudson R. R. R. Co.*, 29 Barb. 229; *Ernst v. Hudson R. R. R. Co.*, 39 N. Y. 61; S. C., 24 How. Pr. 97; *Suydam v. Grand St. R. R. Co.*, 41 Barb. 380; *Grippen v. N. Y. C. R. R. Co.*, 40 N. Y. 52; *Warner v. N. Y. C. R. R. Co.*, 44 id. 465; 35 id. 37.

JOHNSON, C. A nonsuit was moved for and granted in this case, on the grounds that the plaintiff's negligence contributed to the injury he sustained, and that no negligence on the part of the defendant was shown. The law is indisputable that if either of the grounds of the motion existed in the case, the decision was correct. In my opinion neither of the grounds of the motion appeared upon the proofs, and certainly not with that plainness which authorizes the withdrawal of the questions from the consideration of the jury. I agree entirely with the doctrine stated in the respondent's points and sustained now by very numerous decisions, that it is the duty of the court to nonsuit where there is an absence of proof showing negligence in the defendant, or where the negligence of the plaintiff is manifest; neither of these propositions can be affirmed in this case.

Was the proof absolute showing negligence in the defendant? The defendant's sleigh was being driven down Fulton street, in Brooklyn. There had been a storm and there were banks of snow on each side of the street, a coal sleigh was coming up the street quite rapidly, and could be seen at a distance, a passenger on the stage sleigh called its driver's attention to it, and to the chance of a collision. The stage sleigh was in the middle or on the left side of the street, and the coal sleigh was approaching on that which was its own side of the street. There was plenty of room to the right for the stage sleigh driver to have turned out in. Just as

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the collision took place the stage sleigh was turning from the left to the right, and the coal sleigh was turning in toward the sidewalk. The horses of the stage sleigh were going as slow as they could possibly walk, and the coal sleigh at an easy trot. The sleigh was slipping, and as the coal sleigh was being drawn up the ridge on its right, in the act of passing the other, it slid and collided with the other crushing the leg of, and otherwise injuring the plaintiff. This relation of the occurrence, almost in the language of the witness, seems to me to show negligence on the part of the defendant. If the driver had turned at once to his own side of the street, or had hastened the movement of his horses, he could readily have avoided the collision. The movement out of the center of the street was necessary for each sleigh; the probability of slipping in executing it was obvious. He saw the more rapid approach of the coal sleigh, and should have earlier begun to avoid the obvious danger of collision, or should have moved faster in turning. At the least it is not as matter of law upon such facts that the defendant can be declared free from negligence, and the ruling of the court has deprived us of the light which might have been afforded by the finding of the jury.

Notwithstanding this conclusion the question remains in respect to the plaintiff's negligence. The sleigh was furnished with wide and flat board guards, foot-boards or fenders, as they are called in the testimony, upon which persons usually rode when the seats were occupied. That they were intended for this purpose is fairly to be inferred, as well from the fact that a hand-rail was placed conveniently on each side, by which a person standing on the fender could hold and steady himself in riding, obviously constructed for that purpose, as also from the practice of receiving passengers to ride there, and taking their fares without objection. I do not think the defendant should be heard to say, under such circumstances, that it is negligence *per se*, for a passenger to ride in such a situation when no other place was accessible to him, and when he was received as a passenger by the driver, the defendant's agent. Nor is it any answer to say, that an obvious risk attends riding on the outside which does not belong to a seat inside, nor to riding on the left side more than on the right. A passenger upon such a vehicle has a right to assume that the parts of the vehicle prepared for the use of passengers and destined to receive them while in transit, are suitable and safe for the purpose; and that the care of the drivers

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will avoid any special risks which attach to the particular position. Especially is such a rule to be applied when it appears that the actual injury would not have resulted without the negligence of the driver, for although the driver of the coal sleigh was also negligent, that does not excuse the negligence of the defendant's driver, nor relieve it from responsibility.

In the discussion of this evidence I have dealt with it as I think a jury might warrantably have done if the case had been submitted to them, as I think the law required.

The judgment should be reversed and new trial ordered.

All concur.

Judgment reversed.

REDLICH v. DOLL, appellant.

(64 N. Y. 234.)

Promissory note — alteration — filling blank.

Defendant made his promissory note payable to himself and indorsed it. No place of payment was inserted, there being a blank after the word "at." Defendant delivered the note to J. S. upon the agreement that it should not be negotiated or stamped, and intending that it should operate simply as a receipt. J. S. subsequently stamped the note and inserted a place of payment in the blank and negotiated it. *Held*, that defendant was liable on the note to a *bona fide* holder for value. (*See note, p. 578.*)

ACTION by Abraham Redlich and others as indorsees of a promissory note against Nicholas Doll as maker. The note was in the following form :

"NEW YORK, September 30, 1868.

"Three months after date I promise to pay to the order of myself, six hundred and seventy-nine dollars and twenty cents, at——

"Value received.

"N. DOLL."

This note was indorsed by defendant and given by him to one Istel, upon the agreement that it should not be stamped or negotiated, and that it should operate as a receipt, for certain drafts.

Istel subsequently stamped the note and inserted a place of payment in the blank, between the words "at" and "value received." He then negotiated it. Plaintiff received the note before maturity, in good faith, and for value. Judgment was rendered on report of a referee in favor of defendant, on the ground that the note was not stamped at the time of delivery, and that the note was altered materially. The general term granted a new trial. Defendant appealed to this court.

Isaac Edwards, for appellant. The alteration avoided the note, even against a *bona fide* holder. Byles on Bills, 253; Chitty on Bills, 182; 2 Parsons' Bills & Notes, 546, 547; *Burchfield v. Moore*, 3 El. & B. 683; *Master v. Miller*, 1 Smith's L. C. 458; *Davidson v. Cooper*, 11 Mees. & Wels. 778, affirmed 13 id. 343; *Burchfield v. Moore*, 3 E. & B. 683; *Master v. Miller*, 1 Smith's L. C. 458; *Nazro v. Fuller*, 24 Wend. 374; *Southwark Bk. v. Grass*, 35 Penn. St. 80; *Sturges v. Williams*, 9 Ohio St. 443; *Woodward v. Bk. of N. A.*, 19 Johns. 391, 419; *Griffin v. Rice*, 1 Hilt. 184; *Mead v. Mer. Bk.*, 25 N. Y. 143. The alteration gave the note a different legal effect. *Holmes v. Trumper*, 22 Mich. 527; 7 Am. Rep. 661; *Bruce v. Westcott*, 3 Bosw. 374; *Martin v. Ballou*, 13 id. 119; *Com. Bk., etc., v. Patterson*, 2 Cranch, 346; *Simpson v. Stackhouse*, 9 Penn. St. 186, 3 R. S. 951 (5th ed.); *Stahl v. Buger*, 10 S. & R. 170; *Mitchell v. Ringgold*, 3 Har. & J. 152; *Boyd v. Brotherson*, 10 Wend. 93; *Clute v. Small*, 17 id. 237.

F. C. Cantine, for respondents.

EARL, C. I am well satisfied, upon a long line of authorities, that the insertion of the place of payment in this note did not avoid it in the hands of a *bona fide* holder for value.

The defendant made his note perfect in form except the place of payment, and intrusted it to Istel for a special purpose. If the word "at" had not been inserted in the note it would have been a complete note without the insertion of other words. But with that word in, preceding a blank, it carried upon its face an implied authority for any *bona fide* holder to insert the place of payment. In such case, if the note be used, or the blank filled up contrary to the agreement or intention of the original parties, the maker is held

liable to any *bona fide* holder for value, upon the principle that, where one of two innocent parties must suffer by the fraud or wrong of a third person, the one who put it in the power of such third person to commit the fraud or wrong must bear the loss. The liability of the maker in such case has also, sometimes, been placed upon the principle of estoppel; he, having put his paper in circulation, and thus invited the public to receive it of any one having apparent title, is estopped to urge the actual defect of title against a *bona fide* holder. Upon one or both of these principles the defendant must be held liable. In *Mitchell v. Culver*, 7 Cowen, 336, the note was made and indorsed on the 27th day of November, payable in 60 days, with the day of the month in blank, and the maker delivered it to the plaintiff in the suit, who, by the direction of the maker, filled the blank with the fifth day of November. It was held that, where the indorser of a note commits it to the maker with the date in blank, the note carries on the face of it an implied authority to the maker to fill up the blank. To the same effect is *Page v. Morrell*, 3 Keyes, 117. In *Van Duzer v. Howe*, 21 N. Y. 531, the defendant, Howe, wrote his acceptance upon three drafts, all in blank as to the amount, and delivered them to the drawee with directions to fill up the blanks for sums not exceeding in the aggregate \$1,000, to which the drawee assented. He filled up one of them, the draft sued on, for \$1,200. It was held that a party who intrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor; and that though the filling of the blank, in violation of the agreement of the parties, be a forgery, the acceptor is estopped from setting up the fact. In *Vallett v. Parker*, 6 Wend. 616, it was held, that the fact that the note was delivered as an *escrow*, and fraudulently put in circulation, was no defense to it in the hands of a *bona fide* holder. In *Garrard v. Hadden*, 67 Penn. St. 82; 5 Am. Rep. 412, the maker signed a printed note in the blank of which was written "one hundred," leaving a blank space between that and "dollars," which was in print. This, after delivery, was filled with "fifty." It was held that he was liable for the face of the note to a *bona fide* holder for value, upon the principle that, if one, by his acts, or silence, or negligence, misleads another, or effects a transaction whereby an innocent party suffers, the blamable party must bear the loss. In *Younge v. Grote*, 4 Bing. 253, a customer of a banker delivered to his wife certain

printed checks, signed by himself, but with blanks for the sum, requesting his wife to fill the blanks up according to the exigency of his business. She caused one to be filled up with the words, "fifty pounds, two shillings," leaving a space before the word "fifty." In this state she delivered it to her husband's clerk to receive the amount, whereupon he inserted at the beginning of the line, before the word "fifty," "three hundred and." The banker having paid the whole amount, it was held that the loss must fall upon the drawer on the ground of his negligence.

In *Kitchen v. Place*, 41 Barb. 465, it was held, that where a blank space is left in a promissory note after the word "at," in the place where the place of payment is usually mentioned, the holder of the note is authorized by an implied authority to fill the blank; that the word "at" implies that the blank space which succeeds it may be filled before the note is delivered with a designated place of payment.

If a note be obtained from a maker by fraud, even if the fraud amount to a felony, under the statute against false pretenses; if it be made for one purpose and used by the holder for another; if it be delivered in blank, with an agreement that the blank shall be filled in one way, and it be filled in another, in all these cases the maker is liable to a *bona fide* holder for value. The maker, rather than such holder, must suffer from his negligence or misplaced confidence. The learned counsel for the appellant claims, however, that the rule is different where the note, as in this case, is delivered not to be used or filled up in any way. I can perceive no difference founded upon any principle. In the one case the note is delivered to be used or filled up in a particular way, and it is used or filled up in an entirely different way. In the other case, the note is made and delivered not to be used in any way. In each case there is the same wrong to the maker, the same misplaced confidence, and the same breach of trust. In either case, justice as well as the public policy, which lie at the foundation of the laws as to commercial paper, require that the loss shall fall upon the maker rather than on the innocent holder.

In this case the liability of the defendant could be based upon his negligence. He gave a note to operate as a receipt, a purpose to which it is no way adapted. He made the note payable to his own order, and if he had stopped there it would have been just as useful as a receipt, and could not have been used against him as a

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note. But he made it negotiable by indorsing it, thus enabling Istel to perpetrate the fraud. He must therefore be held liable.

These views are not in conflict with the case of *Benedict v. Cowden*, 49 N. Y. 396; 1 Am. Rep. 382, to which our attention has been called. In that case defendant was applied to to become agent for "George N. Palmer, Rohe & Lidder." He consented, and it was agreed that he should sign a note for \$200 with a contract in it that the note should be paid out of the profits of the machines when sold. A note was presented for \$200 and interest, payable to George N. Palmer or bearer one year from date. At the bottom of the note were these words: "The above note to be paid from the profits of machines when sold." There was not room below this to sign; defendant was advised that it would be the same if he signed above or below this memorandum; he therefore signed above it, and delivered the note with the memorandum thereon. Subsequently this memorandum, without the knowledge or consent of defendant, was cut off and the note sold to plaintiff for value without notice. In an action upon this note, the judge submitted to the jury the question whether the words at the bottom were designed by the parties as a part of the contract. They found for the defendant. The court, upon appeal, held that this memorandum was a substantial part of the contract, and qualified it the same as if inserted in the body of the instrument, and with it constituted a single contract, and that the severance of it without the consent of the maker was a material alteration, which destroyed the note even in the hands of an innocent holder for value. The same force and effect was given to the memorandum, as if it had been written above the signature; and hence it was a part of a complete instrument, and its severance upon well-recognized principles was clearly a material and, hence, destructive alteration. The question, whether the defendant by his act, negligent or otherwise, enabled this forger to commit the forgery, and perpetrate a fraud upon an innocent purchaser of the note, was not raised at the trial, and hence was not involved in the decision of the appeal.

The stamp was omitted from this note simply that it might not be used as a note. There was no intention to defraud the revenue, and hence the omission of the stamp did not render the note invalid. *Green v. Hawkey*, 101 Mass. 243; *Burnap v. Losey*, 1 Lans. 111; *Vaughan v. O'Brien*, 57 Barb. 492. It matters not that the stamp

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was intentionally omitted so long as it was not omitted for the fraudulent purpose.

The order of the general term must therefore be affirmed, and judgment, absolute, ordered against the defendant, with costs.

All concur.

Order affirmed and judgment accordingly.

NOTE. — See *Holmes v. Tremper*, 22 Mich. 427; 7 Am. Rep. 661, and note, 669; *Rainbolt v. Eddy*, 24 Iowa, 440, 11 Am. Rep. 153 and note, 153; and *Garrard v. Hadden*, 67 Penn. St. 82, 5 Am. Rep. 412. In *Holmes v. Tremper*, inserting the rate of interest in a blank after "interest at," was held to avoid the note as to the maker in the hands of a bona fide holder. But in *Rainbolt v. Eddy*, the same alteration was held not to discharge the maker, and *Garrard v. Hadden* was to the same effect. — REP.

BELTON V. BAXTER, appellant.

(54 N.Y. 245.)

Negligence — Highway — injury to foot traveler by collision.

Plaintiff, desiring to cross a street in a city and seeing a car coming and behind it a cart which was going faster than the car, made his "calculation" that he could cross in front of the car "before the cart could get up." He accordingly made the attempt to cross and passed in front of the car, but came in contact with the cart and was injured. In an action against the owners of the cart, *held*, that plaintiff was guilty of contributory negligence defeating a recovery.

A foot traveler has no priority of right over vehicles in a city.

ACTION by Daniel Belton against Edward W. Baxter and others to recover for injuries received by plaintiff while crossing a street in New York by collision with defendant's cart. The opinion states the case. The plaintiff obtained a judgment, which was affirmed at general term. Defendants appealed to this court

N. C. Moak, for appellants.

Stephen A. Walker, for respondent.

REYNOLDS, C. There should be a new trial in this case, for the following reasons:

(1.) The plaintiff was guilty of negligence which certainly contributed to his injury, and this is apparent upon his own testimony.

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He wanted to cross Second avenue, on Fourth street, where he resided. It was near evening, but still daylight, and he saw a Second avenue car coming just above Third street, and behind it a cart also coming. The car was moving pretty fast, and all this was plainly seen when he was between eleven or twelve yards from the curbstone in Second avenue. He hurried on a little, and made his "calculation" that he could cross in front of the car, "before the cart could get up." It is thus evident, that the plaintiff expected the cart to attempt to pass the car as it did, and his calculations were accordingly made. He stepped on, the car came faster than usual, he just passed the heads of the horses attached to the car, and at that moment came in contact with the horse and cart of the defendants, or some of its appendages, and received the injury. This makes out a plain case of negligence. He clearly saw the possible danger, and made his calculations to pass ahead of both car and cart and failed. The carman of the defendants had no reason to suspect that any such attempt would be made. He could not see the plaintiff as the street car obstructed the sight, and it can scarcely be said, that he was guilty of negligence in driving his cart. It is negligence *per se* for a foot traveler to attempt to cross a public thoroughfare ahead of vehicles of any kind under such circumstances, upon nice calculations of the chances of injury. If such attempt be made and the calculations fail, to the plaintiff's harm, he can have no redress for injuries received in his mistaken effort. It is not the exercise of common or ordinary care.

(2.) The judge charged the jury that the plaintiff "had a right to go in front of the vehicle and cross at that time if he did not place himself in a position where this vehicle by proper care could not avoid him. He had as much right to cross there as the vehicle had to go on in the other direction."

It may be possible that, as a mere abstract legal proposition, this may have been correct, but as applied to this case, it obviously tended to mislead the jury, and relieve the plaintiff from the exercise of any care. No matter how negligent the effort of the plaintiff to cross the avenue may have been, it was said he might still recover if the defendants could have avoided the infliction of the injury. It is very obvious, also, that the learned judge intended to give the jury to understand that the foot traveler had some priority of right over vehicles in the city of New York, for he tells them "I hold it as a principle of law that if I attempt to cross

Broadway, or any other crowded thoroughfare, I am not obliged to turn back to avoid a vehicle if that vehicle by reasonable care can avoid me. It is the business of the driver to stop and allow me to pass, it is not my business to turn and go back for the purpose of avoiding him, I am there by right, and my right is paramount to his because I am the first in point of time." In this case it was very unfortunate that the plaintiff was not there first in point of time, but both parties reached the point of collision at the same instant of time without the one then expecting to meet the other. But it seems clear that such instructions were in violation of the rule laid down by the Court of Appeals in *Barker v. Savage*, 45 N. Y. 191; 6 Am. Rep. 66.

The learned judge who delivered the opinion of the general term of the superior court, quoted approvingly the charge to the judge at the trial, the correctness of which we feel compelled to doubt, and then adds that such a rule has been frequently asserted by that court, and he thought should be sometimes, at least, recognized by the drivers of vehicles, who, it is also said, "practically and habitually regard foot passengers as mere intruders upon and obstructors of the highway, who can be run over with impunity." We entirely agree that the drivers of vehicles in any public thoroughfare should observe the law, without any special reference to the court by which it is pronounced. The evidence does not disclose the ordinary habits in this respect of the drivers of vehicles in the city of New York, and we are not at liberty to take judicial notice of the fact, even if verified by the personal observation and experience of any one or more of the learned judges of the superior court of that city.

All concur.

Judgment reversed.

People ex rel. Purdy v. Commissioners of Highways.

**PEOPLE ex rel. PURDY v. COMMISSIONERS OF HIGHWAYS OF THE
TOWN OF MARLBOROUGH, appellant.**

(34 N. Y. 373.)

Constitutional law — Statute — requisite vote must appear in act.

The constitution required certain laws to be passed by a two-thirds vote of the legislature. *Held*, (1) that such a law, not appearing on its face to have been passed by the required vote, was void, and (2) that the objection to the law need not be pleaded. See *Osborne v. Staley*, post.

MANDAMUS requiring defendants as commissioners of highways of the town of Marlborough, Ulster county, to proceed and lay out a highway under laws of 1868, chapter 776. The return set up matters of avoidance, but did not question the validity of the statute. Judgment was rendered in favor of plaintiff on demurrer to the return. The general term affirmed the judgment and defendants appealed.

Amasa J. Parker, for appellants.

M. Schoonmaker, for respondents.

JOHNSON, C. The mandamus in this case is confessedly founded upon a supposed statute of this State, chapter 776 of the laws of 1868, and has no legal support if the supposed statute was never the law of the State. The first section appears to provide that the commissioners of highways of the town of Marlborough are authorized and directed to lay out the highway (describing it), and vests in the town for road purposes the right, title and interest of the State in so much of the lands as may be necessary for the purposes of said highway. This section purports to dispose of a part of the public property for a local purpose, and therefore falls within the provisions of section 9 of article 1 of the constitution. That section ordains that "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." That the section in question appropriates public property is obvious

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upon its face ; that the purpose to which it is thus appropriated is local, in the sense of the constitution, has been adjudged, in principle at least, in *People v. Allen*, 42 N. Y. 378. It is not important in this case to decide whether, by force of the constitutional provision, the whole of every such bill is to be deemed inoperative as law in case any part of it contains such an appropriation, and the bill has not been passed in conformity with the constitutional requirement, or whether the provision may be satisfied by the rejection of that part only of such an act as makes an appropriation. In this case, the grant to the town of the public land is so important a part of the whole provision, that it cannot be doubted that, in the contemplation of the legislature, it was an essential and fundamental portion of the act, without which the bill would not have been passed at all.

The only remaining inquiry is, therefore, whether, as this case is presented, the question can be raised as to the vote by which the bill was passed; and if it can, how it ought to be determined. The objection to its being raised is that the defendants in pleading have admitted the obligation of the law. But matter of law is never matter to be alleged in pleading. No issue can be framed upon an allegation as to the law. Facts only are pleadable; and upon them, without allegation, the courts pronounce and apply the law. This is true alike in respect to statute and to the common law; and when it is necessary to inquire by what vote a law was passed, the judges are to determine from the printed statutes, or from the laws on file in the Secretary of State's office, whether the requisite vote was received. Upon such an inquiry the printed volume is presumptively correct, and the original act is conclusive. See chap. 306, Laws of 1842. How such a question was to be investigated was much considered in the earlier cases arising under the free banking act of 1838; and the discussions which then took place led the way to the subsequent determinations of the courts that it belonged to the function of the judges to investigate for themselves and to declare what is the law, whether common or statute. *People v. Purdy*, 2 Hill, 31 ; S. C., in error, 4 id. 384 ; *De Bow v. The People*, 1 Den. 9; *Commercial Bank v. Sparrow*, 2 id. 97 ; *People v. Derlin*, 33 N. Y. 269.

The law in question does not appear either upon the printed statute book or upon the original act to have been passed by a two-third vote, and consequently it never had the effect of law. The

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whole foundation of the mandamus therefore fails and the judgment must be reversed; and as it appears by necessity that the mandamus cannot be sustained, judgment final must be rendered for the defendants, with costs.

All concur.

Judgment accordingly.

SEYBEL, appellant, v. NATIONAL CURRENCY BANK.

(54 N. Y. 233.)

Stolen bonds — notice to purchaser. Purchaser in good faith. Evidence.

In an action to recover the value of two negotiable United States bonds, it appeared that the bonds, with others, were stolen from plaintiff and purchased on the day after the theft, by defendant, a national bank; that on the morning after the theft notice thereof, with the number and description of the bonds, was left in defendant's bank on a desk marked "cashier's desk." Evidence was then admitted in behalf of defendant, that the cashier did not in fact examine the notice. Defendant also offered to show, in effect, that it was impracticable for it, in the prosecution of its business, to regard notices of this character left at its banking house, on account of the frequency and number of such notices, and the amount of business which defendant transacted in such bonds. This evidence was excluded. *Held*, error. Mere omission of the cashier to read, or become informed of, the contents of such notices, is not want of such due and reasonable care, caution and prudence, as to deprive defendant of the protection extended to it as a *bona fide* purchaser, and the evidence excluded would have tended to show that no bad faith was imputable to defendant. (*See note, p. 595.*)

The doctrine of *Goodman v. Harvey*, 4 Ad. & El. 870, considered and applied.

ACTION brought by Frederick Seybel against The National Currency Bank to recover the value of two United States bonds of \$1,000 each, payable in 1881, which had been stolen from plaintiff and purchased, the next day after the theft, by defendant. The opinion states the case. The plaintiff obtained a verdict and judgment. The general term reversed the judgment and granted a new trial. Plaintiff appealed to this court.

Walter S. Poor, for appellant, cited to the point that if the notice reached defendant and it chose to disregard it, it was not a purchaser in good faith. *Whitebread v. Jordan*, 1 You. & Col. 303

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May v. Chapman, 16 Mees. & Wels. 355; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Williamson v. Brown*, 15 N. Y. 354; *Devlin v. Brady*, 36 id. 531; *Newell v. Doty*, 33 id. 83; *Jackson v. Post*, 9 Cow. 120; *Wiggin v. Bush*, 12 Johns. 306; *Comstock v. Hoag*, 5 Wend. 600; *Small v. Smith*, 1 Den. 583; *Johnson v. Bloodgood*, Caines' Cas. 302; *Clark Nat. Bk. v. Bk. of Albion*, 52 Barb. 592; *Newell v. Gregg*, 51 id. 263; *Owen v. Homan*, 4 H. L. 997, 1035; *Jones v. Williams*, 24 Beav. 47.

Amasa J. Parker, for respondent.

Lorr, Ch. C. A new trial was properly granted in this case, on the ground of the improper exclusion of evidence offered on the part of the defendant. It is stated in the respondent's points that the bonds in question were payable to bearer. I do not find the fact proven, but it appears to have been assumed on the trial that they were such, or at least transferable by delivery. They must, therefore, be deemed to have been of that description. The plaintiff proved a demand of them from the defendant on or about the 28d day of September, 1865, being eleven days after they were stolen, and its refusal to deliver them. The demand was made of the cashier, and he answered, according to the plaintiff's statement, "You can't have them." To which the plaintiff replied (as he states) as follows: "Then I said, why? I sent you a printed notice of the robbery the next morning," adding, "He said they did not care for the notice. We don't care for notice. That was the answer. He said, if you wait a little while you can see Mr. Thompson, and I waited." The plaintiff then, without any previous explanation given by the defendant of the circumstances under which it obtained possession of them, and before any proof whatever was given by it—introduced evidence tending to show that two printed notices of the robbery, containing the numbers of the bonds in question, and of fifteen more, were left before nine o'clock in the morning after it occurred, in the banking-house of the defendant—one on a desk marked "cashier's desk," and the other on the desk opposite—while persons were sweeping the office, in such a position as to be noticed by the occupants of the desks when they came in and took their places. The bonds in question were designated therein as follows: bond 37,864, \$1,000, 1881; bond 37,865, \$1,000, 1881; after a statement that seventeen United

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States bonds had been stolen, numbered and described as mentioned in the notice. After this testimony had been introduced, the plaintiff rested, and the defendant's cashier was examined on its behalf, and after giving a description of the locality of his desk, and stating facts tending to prove that the desk, described by one of the plaintiff's witnesses as his, was not so in fact; stated that he did not see the notice referred to, to his knowledge, and gave other testimony tending to show the purchase of and payment for the bonds by the defendant (which was dealing daily in government securities of all kinds, and in all kinds of bonds), in its usual course of business, and the price paid for them, which was subsequently shown to be their full market value. He also testified that there were three kinds of bonds of 1881, and that there were two sets of bonds payable in 1881 of the numbers of those in controversy, and that he had been in the banking business a number of years.

The defendant's counsel then offered to prove, by this witness, the following facts :

"1st. That these government securities are payable to bearer. That the amount in circulation is so great, and the amount stolen and lost is so great, and the notices of such thefts and losses so frequent that it is utterly impossible, without stopping their business, for the defendant to take notice of and keep track of those lost and stolen.

"2d. That the defendant dealt largely in government bonds similar to these, and that they are received and paid out as money by defendant, and by bankers and brokers generally; that very large amounts, amounting to several millions, had been stolen and advertised; that notices are being thrown in constantly in their bank of such thefts, with lists, numbers and descriptions, and that it would be impracticable to deal in government securities if they are bound to take notice of such notices.

"3d. That U. S. securities like those in suit pass from hand to hand by delivery, are received and paid out by banks, bankers and brokers as money, are bought and sold daily in the market, in parcels varying from \$1,000 to \$500,000, and that they are always paid for in cash on delivery.

"4th. As a separate proposition, in connection with the last above proposition, that printed notices of loss of such and other securities, by theft and otherwise, are daily, and frequently each day, thrown or brought into the offices of dealers in such securities,

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and that it is impracticable, in the ordinary course of such business, to make a comparison between such notices and the securities purchased and delivered.

"5th. The defendant's counsel then made the same offers numbered herein 3d and 4th, confining the same to defendant's bank, and not to dealers, banks and bankers generally."

Each proposition was offered separately in the order above set forth, and was excluded on general objection to each of them, without specifying any ground therefor, and a separate exception to each ruling was taken by defendant's counsel.

The cashier then stated, in reference to the interview between the plaintiff and himself, spoken of by the plaintiff, that what he told him was that it would be impossible for them to pay attention to all notices, and on being asked by the defendant's counsel whether he said that he could not pay any attention to notices, he answered that he "did say something like that;" and in answer to a question by the plaintiff's counsel, whether that statement was in fact true, he made the following answer: "It was true; we buy and sell bonds without any regard to these notices left in the office; we look at notices from time to time, but we keep no record of them; no instructions are given by me to the clerks or officers to bring the notices to me personally." He stated further that he was in the office at nine o'clock of the morning of the thirteenth of September, but could not tell whether any one else was.

It is apparent, from the preceding statement of what had been proved by the plaintiff, when the testimony offered on behalf of the defendant was excluded, that his object and its tenor was to show that the defendant's cashier, by saying "We don't care for notice," willfully disregarded all notices, that were left at its office or place of business, of thefts or robberies of such bonds as were stolen from him. Its tendency and its probable effect was to impress the jury with the belief that the defendant was not a purchaser in good faith, but was, on the contrary, chargeable with bad motives and actual fraud. It afforded sufficient ground for the plaintiff's counsel to argue to them, as he has urged in his points on the argument before us, that "if from this the jury could not infer fraud, it would be difficult to infer it in any case. As well might the defendants put up a sign, 'stolen goods received here, and no questions asked.'" Such an appeal made by eloquent counsel, having the opportunity of closing the summing up, on such facts could not

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well fail to secure from the jury a verdict against the defendant, proved to be "a regular national bank," in favor of the plaintiff, who had informed them that he carried on "a fancy store" at 111 Eighth avenue, and resided "in the *upper* part," and that he had lived there fourteen years.

The general purport of the proof offered and rejected was to repel and remove all and every ground for the imputation of bad faith to the defendant, by showing that it was impracticable, and indeed impossible for it, in the prosecution of its business, to regard notices left at its banking-house or office, as those in question were stated to have been. Its exclusion appears to have been placed on the ground that the mere omission of the cashier to read, or become informed of, the contents of such notices, if he saw them, or might have seen them, but for the defendant's disregard of them, as testified to by him, charged it with such want of due and reasonable care, caution and prudence, and such gross negligence in making its purchase, as to deprive it of the protection extended to a *bona fide* purchaser. This is inferable from the general scope and tenor of the judge's charge to the jury, although he did not assign that reason at the time he excluded the evidence. His ruling was in accordance with the rule of law, as declared by the King's Bench, *Gill v. Cubitt*, 3 Barn. & Cress. 466, decided in 1824, and subsequently modified by the decision in *Crook v. Jadis*, 5 Barn. & Adol. 909, made in 1834. See also *Backhouse v. Harrison*, id. 1998. The rule was, however, repudiated in *Goodman v. Harvey*, 4 Adol. & Ell. 870, decided in 1836. That was an action against the drawers of a bill by an indorsee for value, whose title was disputed on the ground that his indorser, who had paid no value for it, obtained its discount in fraud of the right owner. It appeared that the drawees refused acceptance of the bill, and that the notarial marks of non-acceptance were noted thereon. It was objected, as one ground of defense, that the plaintiff, in taking the bill with such marks on it, had been guilty of gross negligence, and therefore took it with all its vices, and could have no better right to recover thereon than his indorser. Lord Chief Justice DENMAN is stated, in the report of the case, to have been of this opinion, and to have observed "that the plaintiff had received the bill with a death wound apparent on it, and he proposed to the plaintiff's counsel either a nonsuit or that the cause should go to the jury on the question whether or not the plaintiff had been

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guilty of gross negligence. The jury, in answer to the question from the lord chief justice, said that, in their opinion, the notary's marks on the bill were sufficient notice to an indorsee of non-acceptance." A nonsuit was then taken, and at the next term of the court a motion for a new trial was made on the ground that the above ruling against the plaintiff was incorrect; that the bill had been lawfully sent into the market by the payee, while not yet due, and that the plaintiff, who had taken it before maturity and given value for it, had a right to recover the amount, notwithstanding the defect in the title of an intermediate party. A rule *nisi* was granted; and subsequently, on hearing counsel on the part of the defendant against it, the plaintiff's counsel, after some discussion in support of it, and after stating that the only question was whether the plaintiff acted *bona fide* in discounting the bill, was stopped by the court, and Lord DENMAN, C. J., said: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of a contrary doctrine. Where the bill has passed to the plaintiff, without proof of bad faith in him, there is no objection to his title. The evidence in this case, as to the notarial marks, could only weigh, as rendering it less likely that the bill should have been taken in perfect good faith." LITLEDALE, PATTERSON and COLBRIDGE, JJ., concurred, and the rule was thereupon made absolute.

The doctrine there laid down was reaffirmed by the same court, in *Uther v. Rich*, 10 Adol. & Ell. 784, decided in 1839; *Arbouin v. Anderson*, 1 Q. B. 498-504, decided in 1841, and is now understood to be undisputed in England. See Byles on Bills of Exchange, 119; he says: "It is now definitely settled that if a man takes, *honestly*, an instrument made to become payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induces the jury to find *fraud*." And he also says that "Exchequer bills, which are payable to bearer before the blank is filled up, bonds of foreign princes and States, payable to bearer, and East India bonds resemble money and bills of exchange payable to bearer, in the necessary union of possession and property. Honest acquisition confers title."

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Chancellor KENT, in his Commentaries (vol. 3, p. 82), seems to have considered the rule to be, that in any case in which the indorsee takes paper under circumstances which might reasonably put the holder upon inquiry and create suspicions that it was not good, he takes at his peril; and he refers to the case of *Gill v. Cubitt*, *supra*, as establishing that principle, and as overruling the doctrine of Lord KENYON, in *Lawson v. Weston and ors.*, 4 Esp. N. P. 26, in which he, in answer to a claim on behalf of the defendants that "a banker or any other person should not discount a bill for one unknown, without using *due diligence* to inquire into the circumstances," replied that "if there was any fraud in the transaction or if a *bona fide* consideration had not been paid by the plaintiffs to be sure they could not recover; but to adopt the principle of the defense to the full extent stated, would be to paralyze the circulation of all the paper in the country, and with it all its commerce," but added, "that the circumstance of the bill having been lost, might have been material if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement, and it would be going a great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount."

The doctrine as laid down in *Goodman v. Harvey*, *supra*, was considered by the Supreme Court of this State, in *Hall v. Wilson*, 16 Barb. 548, and it was said by W. F. ALLEN, J., giving the opinion of the court, in July, 1858, that it had been adopted and approved by the courts of some of the States of the Union, and that he had met with no case in our own courts in conflict with it, and added, "So that, in the absence of evidence of bad faith in the holder, if he is, in other respects, within the rule established for the benefit of commercial paper, his title will be upheld."

It appears to have been disapproved by the Superior Court of the city of New York in *Pringle v. Phillips*, 5 Sand. 157, decided in June, 1851, but as that was an action of replevin in the *detinet*, for the recovery of *merchandise* which had come into the possession of the defendant from a fraudulent vendee of the plaintiff, as security for advances made, but, as alleged by the plaintiff, with notice of the fraud, the question now under consideration was not involved therein.

The subject came before the Supreme Court of the United States in 1857, on a writ of error from the circuit court for the district

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of Missouri, in *Goodman v. Simonds*, 20 How. (U. S.) 343. That was an action against an acceptor of a bill of exchange placed in the hands of the plaintiff by the drawer as collateral security for his own debt, and in which the circuit judge instructed the jury that if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that the drawer had no interest in the bill and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained the facts, then they would find in favor of the defendant. That instruction was held to be erroneous. Justice CLIFFORD, in giving the opinion of the court, said, there was no doubt that the circuit court, in giving that instruction, intended to apply the doctrine to the case that the title of a holder of a negotiable bill of exchange, acquired before maturity, is not protected against prior equities of the antecedent parties to the bill, where it was taken without inquiry and under circumstances which ought to have excited the suspicions of a prudent and reasonable man ; and after stating that a well-defined and correct exposition of the rights of a *bona fide* holder of a negotiable instrument was given by that court in *Swift v. Tyson*, 16 Pet. 1, in 1842, and that such exposition was adopted by it relative to the point then under consideration "as one accurately defining the nature and character of the title to those instruments, which such holder acquires when they are transferred to him for a valuable consideration," added, "This court then said and we now repeat, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties, the transaction may be without any legal validity." He then proceeded to consider the question on principle and as affected by authority ; and after a very able discussion of the question and an elaborate and discriminating examination of the decisions bearing on it, he approves of the rule laid down in *Goodman v. Harvey*, *supra*, which, he said had since that decision, undoubtedly, been the settled law in all the English courts. He then added that, according to that rule, applied to the case then under review, "proof that the plaintiff had been guilty of gross negligence in acquiring the bill ought not to defeat his right to

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recover, and if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title." * * "Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any further reasoning to demonstrate that the instruction was erroneous." He then said that "the law has been uniform since the decision in *Goodman v. Harvey*, which was decided in 1836; and we think it will appear upon an examination, that it has always been the same—at least from a very early period in the history of English jurisprudence down to the present time, except for an interval of about twelve years, while the doctrine prevailed which is now invoked in support of the instruction in this case; that doctrine had its origin in *Gill v. Cubitt*, 3 Barn. & Cres. 466." He then remarked, that "A brief reference to some of the earlier cases will be sufficient to show that the decision in *Gill v. Cubitt* was a departure from the well-known and long-established rule upon the subject under consideration;" and after citing *Hinton's Case*, reported in 2 Show. 247; *Anonymous*, 1 Salk. 126; *Miller v. Race*, 1 Burr, 462; *Grant v. Vaughan*, 3 id. 1516; *Peacock v. Rhodes*, 2 Doug. 633; and lastly *Lawson v. Weston & ors.*, 4 Esp. 56, before referred to, he concluded with the remark, that "The cases cited, commencing in 1694 and ending in 1801, are sufficient to show what the state of the law was in 1824, when *Gill v. Cubitt* was decided—especially as the judges of the King's Bench, in giving their opinions on that occasion, did not pretend that there were any later decisions in which it had been modified."

The rule or doctrine adopted in *Smith v. Tyson* and *Goodman v. Simonds*, *supra*, was recognized, approved and reaffirmed in the case of *The Bank of Pittsburgh v. Neal & ors.*, 22 How. 108, and was subsequently applied (in 1864) in *Murray v. Lardner*, 2 Wall. 110, to a purchase of coupon bonds of the Camden and Amboy Railroad Company, payable to bearer. They were stolen from Lardner, who resided near to and transacted business in Philadelphia, on the night of Wednesday the 23d of February, 1859, but the theft was not discovered till Saturday, the 26th. Notices of the robbery appeared in the Philadelphia Ledger (the

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newspaper in Philadelphia having the largest circulation there) and in leading New York papers, on Monday, the 28th. In the meantime, and on the morning after the theft, they were negotiated to Murray, a broker of character, engaged in the negotiation of such bonds, at his office in Wall street, in the city of New York. for full value. They were taken by him on hypothecation for a loan to a man calling himself Dr. A. D. Bates, of Milford, Sussex county, New Jersey, from whom a stock note for its payment was given. The borrower was a stranger to Murray, and was introduced to him by a Mr. Parker, another broker of good character, to whom he applied for the loan. After such introduction, Murray asked him of whom he had got the bonds and also made some inquiries of him as to his acquaintance with persons in the city of New York; he replied that he obtained the bonds of Mr. Lardner of Philadelphia, and named some persons with whom he said he was acquainted, and also stated for what purpose the money was wanted, and thereupon the loan was made. Parker testified that the borrower was a stranger to him and that he so told Murray; but Murray stated, on his examination, that he had no remembrance that Parker made such statement, and he thought if it had been, his suspicion would have been awakened. He also said that it was always his custom to know from whom securities come before dealing, and that it was the custom of brokers generally, but he added that he did not think it necessary to inquire about Bates, he being introduced by Parker. The action was one of detinue, brought in the circuit court for the southern district of New York; and, on the facts above disclosed, the court was asked by the defendant's counsel to charge the jury "that there were no such suspicious circumstances attending the transaction between Bates and Murray as to put Murray on inquiry; and that Murray was not chargeable with bad faith by any omission on his part to inform himself in regard to the bonds and Bates' title to them, further than he did." The court refused so to charge, but did charge them that it was for them to say "whether the defendant had made out that he received the paper in good faith, without any notice of the defect of the title; in other words, of the theft from the plaintiff; or whether there were such circumstances as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper." This instruction was excepted to; and the jury having

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found a verdict for the plaintiff, its correctness was the question brought before the Supreme Court on a writ of error to the circuit court. It was very fully discussed and considered by Justice SWAYNE; and he, in delivering the opinion of the court, after referring to the decision of *Goodman v. Harvey*, and saying that it had been followed by that court in *Swift v. Tyson*, *Goodman v. Simonds*, and again in the *Bank of Pittsburgh v. Neal*, above referred to, said: "In *Goodman v. Simonds* the subject was elaborately and exhaustively examined, both upon principle and authority. That case affirms the following propositions: The possession of such paper carries the title with it to the holder; "the possession and title are one and inseparable; the party who takes it before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it."

THE opinion, after an expression or declaration that the court were well aware of the importance of the principle involved in the inquiry to the commercial world and to the community at large, concludes with this statement: "The instruction under consideration in the case before us is in conflict with the settled adjudications of this court. See also *Galveston Railroad v. Cowdrey*, 11 Wall. 478.

The decisions of the courts in this State are in harmony with the adjudications of the Supreme Court of the United States. See *Steinhart v. Boker*, 34 Barb. 436; *Mages v. Badger*, 84 N. Y. 247; *Belmont Branch Bank v. Hoge*, 35 id. 65; *Welch v. Sage*, 47 id. 143; S. C., 7 Am. Rep. 423.

In the last case it is said by PECKHAM, J., in giving the opinion of the court, that "unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict."

It is clear from the preceding exposition of the law as declared by the decisions of the Supreme Court of the United States, to which I have referred, and which must be deemed to be the settled law,

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that the defendant was under no obligation to make any inquiry of the person who offered the bonds in question for sale, as to his right or title thereto, or to take any special precautionary measures in the purchase of securities by which the interest of other parties should be protected; and if it could be deemed chargeable with want of caution or even negligence in the omission of its cashier or any of its officers to take up and read the notices of the theft that were left on its desks, it was not by reason of such omission alone deprived of the protection of a *bona fide* purchaser. It was necessary for the plaintiff to establish *bad faith*; and if the disregard by the defendant, as stated by its cashier, of notices tended to prove that fact, it was clearly proper to repel the imputation or inference, not only by an explanation of what was stated, but by proving that such disregard was entirely consistent with fair and honest dealing; and was necessary, or at all events, not improper, from the impracticability of paying attention to them. The object of the proof offered was to show, and the facts stated in the offers tended to prove, that no bad faith or fraud could be properly imputable to the defendant from the omission of its cashier or officers to read the contents of notices left with it. Indeed, the fact that the notice of theft of the bonds in question contained a statement that fifteen more had been stolen, with a description of them, would seem to justify the conclusion that the numbers and description of them all could not have been borne in mind and remembered; and that to have made any attention to it, useful or available, it would have involved the necessity of having a record kept to which a reference would be necessary whenever a security was offered to it for sale, without any limitation of time. A rule that would require a purchaser to keep such a record and make such examination would, in its practical operation, throw the risk of purchasing bonds or securities that were stolen or lost, or to which the party offering them had no title, on the buyer, in all cases where a notice of the fact had been left at his place of business at any previous time, whether it actually reached him or not. Any proof that it had been so left would cast the burden on him of satisfying a jury that it had not reached him. The general object of the evidence excluded and rejected in this case was to establish that it was impossible for the defendant, without stopping its business, to regard such notices. If the facts offered to be shown by the first, second and fifth offers, or either of them, had

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been proved and established to the satisfaction of the jury, all grounds for the imputation to the defendant of bad faith and fraud would have been removed; and as full value appears to have been paid for the bonds, and no actual knowledge of or notice to it of the theft was shown, or could be properly inferred, there would have been no right to a recovery by the plaintiff.

The proof was clearly proper for the consideration of the jury, and its exclusion was erroneous. The order for a new trial was therefore properly granted, and it must be affirmed. Judgment absolute must also be rendered against the plaintiff under his stipulation, with costs.

So ordered.

REYNOLDS and GREY, CC., dissented.

NOTE. — See *Gould v. Stevens*, 43 Vt. 125; 5 Am. Rep. 265, wherein it was held that slight circumstances were sufficient to put the purchaser of a note on inquiry as to its consideration. The principle was, however, very elaborately discussed in *Phelan v. Mom*, 67 Penn. St. 59; 5 Am. Rep. 402, and it was therein held that a purchaser, before due and without notice, of a negotiable promissory note, fraudulent as between the original parties, got good title thereto, although he took it under circumstances which ought to excite the suspicions of a prudent man. To the same effect is *Lake v. Reed*, 29 Iowa, 258; 4 Am. Rep. 209.

Goodman v. Harvey was, however, denied in *Sturges v. Metropolitan Bank*, 49 Ill. 220, and it was there held that one takes a bill at his peril if he knows of any suspicious circumstances that would induce a prudent man to inquire into the title of the holder or the consideration of the paper. The weight of authority is, nevertheless, greatly the other way. See Redf. & Big. Lead. Cases, 257. — REP.

**HOYLE V. PLATTSBURGH AND MONTREAL RAILROAD COMPANY,
VILAS, appellant.**

(54 N. Y. 314.)

Railroad—rolling stock personal property. Mortgage—filing of—rights of directors.

In an action to foreclose two mortgages on a railroad and its franchises and equipments it appeared that the rolling stock had, subsequent to the giving of the mortgages, been sold on execution and purchased at a sheriff's sale under judgments in favor of J. S., a director of the railroad company. *Held*, that the rolling stock of the railroad was personal property and the mortgage should have been filed as a chattel mortgage under the law requiring mortgages of personal property to be filed when the possession of the property remains with the mortgagor; that such mortgages having been given

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before the act of 1868 (enacting that mortgages by railroad companies of real and personal property need not be filed as chattel mortgages if recorded properly as real estate mortgages), were void as against judgment creditors; and that J. S. could retain the property purchased by him under the judgment and execution, as against the mortgagees seeking to foreclose.*

ACTION to foreclose two mortgages, for the sum of \$200,000 each, made by the Plattsburgh and Montreal Railroad Company upon its railway, franchises and equipments, in trust for the benefit of bondholders. Defendant Vilas claimed that the mortgages had never been filed as chattel mortgages, and that the rolling stock, subsequent to the giving of the mortgages, had been sold on execution at sheriff's sale under judgments in his favor. Vilas, who had been a director of the railroad company ever since its organization, insisted that the mortgages were void as to a judgment creditor, and that he could hold the rolling stock so purchased as against the mortgagees. The referee before whom this issue was tried found that after the purchase by Vilas, the railroad company hired the rolling stock in question from Vilas, and paid him for the use thereof. The referee found as conclusions of law: That the mortgages covered all the personal property of the company except four platform cars, but, not having been filed as chattel mortgages, were void as to judgment creditors.

That the railroad company had an equitable right to redeem from Vilas the property purchased by him, by reason of his being a trustee at the time of such purchase, though such right was "materially modified" by afterward hiring the property from him. That such right could be claimed and exercised by the plaintiffs as mortgagees of the property in question. But, that such property ceased, upon its purchase by Vilas, to be "subject to the lien" of the plaintiffs' mortgages. And that the plaintiffs have no lien thereon.

The court, however, decided that the rolling stock, excepting the four platform cars, was subject to the lien of the mortgages, and ordered it to be sold. This order was affirmed at general term; and the defendant Vilas appealed to this court.

Samuel Hand, for appellant. The rolling stock of a railroad is personal property. *Prov. Gas Co. v. Thurber*, 1 R. L.

* See *Randall v. Ewell*, 11 Am. Rep. 747 and note.

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22; 2 Abb. N. Y. Digest, 414; 3 id. 146; *Stevens v. Buff. and N. Y. C. R. R. Co.*, 31 Barb. 590; *Beards v. Ontario Bk.*, id. 619; 49 id. 299. A permanent annexation to the freehold is necessary to constitute personal property a fixture. 20 Wend. 639; 2 Kern. 170; 18 N. Y. 28; 20 id. 344; Bing. on R. E. 453; *Gale v. Ward*, 14 Mass. 352. The mortgages being, in respect to the rolling stock, chattel mortgages, and not being filed or registered as such, are void as against judgment creditors. 4 Stat. at Large, 435, § 1; *Ely v. Carnley*, 19 N. Y. 497, 499; *Thompson v. Van Vechten*, 5 Abb. 458. Vilas, although a stockholder and director of the road, was not an agent or trustee, and had a right to purchase the property at a sale on execution. *Mickles v. Rochester City Bank*, 11 Paige, 127; *People v. Fulton*, 11 N. Y. 94; *Roberston v. Bullions*, 11 N. Y. 243; *Cammeyer v. U. G. L. Chs.*, 2 Sandf. Ch. 186; *Bickell v. M. S. and N. I. R. R. Co.*, 22 N. Y. 258; *D. Cap. Soc. v. Olap*, 18 Barb. 35; 1 R. D. 601, § 9; Ang. & A. on Corp., chap. 9, §§ 276, 279, 280, etc.; *Lawrence v. Gibbard*, 41 Barb. 574. The railroad company has no right to claim the benefit of the purchase made by Vilas. *Debson v. Racy*, 8 N. Y. 216; *Hawly v. Bremer*, 4 Cow. 717. Story on Agency, last part of § 210; *Bostwick v. Atkins*, 3 Comst. 53, 60; *Jackson v. Walsh*, 14 Johns. 406, 411, 412.

John N. Whiting, for respondents. The statutes which declare chattel mortgages, unaccompanied by possession, void as against creditors, do not apply to the rolling stock of railroads. *People v. Utica Ins. Co.*, 15 Johns. 381; *Pierce v. Emery*, 32 N. H. 504; *Rex v. Severn and Wye R. R. Co.*, 2 B. & Ald. 646; *Rex v. Eastern Co. R. R.*, 10 Ad. & El. 531; *Rex v. S. Wales R. Co.*, 14 id., N. S., 902; *Clark v. Washington*, 12 Wheat. 46, 54; *Winchester and L. T. Co. v. Vimont*, 5 B. Monr. 1; *Arthur v. Comm. and R. R. Bank*, 9 S. & M. 394; 13 S. & R. 210; 9 Watts & S. 27; 5 id. 265. The rolling stock on this railroad was not personal but real property. *Minn. Co. v. St. Paul's Co.*, 2 Wall. 609; *Murdock v. Gifford*, 18 N. Y. 28; *Potter v. Cromwell*, 40 id. 287; *Voorhees v. McGinnis*, 48 id. 278. A director of a corporation is a trustee for it, and cannot speculate upon its property to the disadvantage of his associate directors. 1 Kern. 266; *Cumberland Coal Co. v. Shearman*, 30 Barb. 571; *Oliver v. Pratt*, 3 How. (U. S.) 333; *Davens v. Fanning*, 2 Johns. Ch. 252; *Michaud v. Girod*, 4 How. (U. S.) 554, 555;

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Wormley v. Wormley, 8 Wheat. 421; *Hawley v. Cramer*, 4 Cow. 736; *Reed v. Warren*, 5 Paige, 652; *Torry v. Bk. of Orleans*, 9 id. 649, *Van Epps v. Van Epps*, id. 241; *Case v. Abel*, 1 id. 393; *Stiles v. Burch*, 5 id. 132; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Van Horn v. Fonda*, 5 Johns. Ch. 588; *Evertson v. Tappan*, id. 497; 2 Redf. on Railways, 332 and note; *Kimmel v. Stoner*, 18 Penn. 155; *Benson v. Heat-horn*, 1 Y. & C. 326; *Gr. Luxemburg R. R. v. Magnay*, 25 Beav. 586; 2 R. S. (5th ed.) 500, § 4, title 4, chap. 18, part. 1. The purchase of the rolling stock by Vilas was voidable by plaintiffs as prior mortgagees. *Iddings v. Bruen*, 4 Sandf. Ch. 277. The hiring of the stock from Vilas, by the railroad company, did not preclude it or Vilas from redeeming. Lewin on Trusts, 8 L. T. (N. S.) 391; 30 Barb. 575. If the mortgages are regarded as chattel mortgages they are good against Vilas, because he had notice of them. *Gregory v. Thomas*, 20 Wend. 17; *Sanger v. Eastwood*, 19 id. 514; *Hill v. Beebe*, 13 N. Y. 556; *Lewis v. Palmer*, 28 id. 271; *Meech v. Patchen*, 14 id. 71.

JOHNSON, C. The first question necessarily to be decided in this case is, whether the rolling stock of a railroad is personal property, or whether it is to be deemed constructively annexed to the road upon which it runs, so as in law to be regarded as part of the realty. If it be determined that rolling stock retains its character of personal property, then the question arises whether a mortgage of a railroad and its equipment needs to be filed under the statute of 1833, requiring mortgages of personal property to be filed when the possession of the property is not immediately delivered to the mortgagee. Laws of 1833, chap. 279, p. 402. The questions thus presented are not authoritatively determined in this State. The opinion of the Supreme Court has been given in four reported cases. The earliest was that of *The Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barb. 484, in which the judgment rendered in October, 1857, by Justices S. B. STRONG, ELDREDGE and DAVIES, declares that as between mortgagees and judgment creditors the rolling stock was to be deemed fixtures, and consequently that such a mortgage did not need to be filed under the act of 1833. In this case the mortgage specified engines, tenders, cars, etc., as part of the property mortgaged, and the rights of the plaintiffs might have been sustained by holding either that the chattel mortgage law did not apply to railroad mortgages, or that engines and cars

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were fixtures. The court rejected the former ground and placed the decision on the position that the rolling stock was part of the realty.

In *Stevens v. The Buffalo & N. Y. C. R. R.*, 31 Barb. 590, decided in September, 1858, Justices GREEN, GROVER and MARVIN held that rolling stock was personalty, and that a mortgage thereof was required to be filed under the act of 1833. Elaborate opinions were written in support of these conclusions, in which the Hendrickson case, before cited, and that of *Coe v. Hart*, in the United States Circuit Court, before Mr. Justice McLEAN, that of *Corey v. The Pittsburgh & F. W. R. Co.*, and *Mitchell v. Winslow*, 2 Story, 690, were examined with the result before mentioned.

In December, 1859, Mr. Justice ALLEN decided in *Beardsley v. Ontario Bank*, 31 Barb. 619, the mortgage was of the railroad, real estate, chattels and franchises of the corporation. It was held that the rolling stock was not covered by the mortgage, not being part of the realty. The last two decisions were acquiesced in; the first, the case of Hendrickson, was taken to the Court of Appeals in 1863, and resulted in an order for re-argument, and subsequently the case was settled. The case now under consideration is reported in 47 Barb. 109, before Justice SUTHERLAND, at Special Term in 1867. He held that rolling stock does not become part of the realty, and that it passed by the two mortgages in question, as specially named, and not as part of the realty. He also held that mortgages of the corporate property and franchises of railroads should not, as to the personal property covered by them, be deemed to be subject to the provisions of the chattel mortgage act of 1833. At General Term the case came before Justices INGRAHAM, SUTHERLAND and G. G. BARNARD, and the decision appealed from was affirmed, Judge INGRAHAM giving the only opinion. After declaring himself not prepared to accede to the opinion at Special Term, that rolling stock is in all cases to be considered as personal property, he holds that the intent of the parties is evident that the rolling stock should pass as part of the realty, and that such a construction should be given to the transaction. He further holds that the chattel mortgage act does not apply to a mortgage executed by a railroad company under authority of section 28 of the general railroad act of 1850. That section warrants a mortgage of the corporate property and franchises of a railroad company to raise money for completing, finishing or operating its

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road. Such a mortgage was intended by the legislature, the learned judge says, to be treated as a mortgage of the road and its accessories, and, therefore, need not be filed as a chattel mortgage. While upon each proposition involved, a majority of judges appear to have been against the claim that rolling stock may be effectually mortgaged without filing, under the act of 1833, the question still remains open for decision.

In respect to the legal methods of disposition, all property is distributed by law under the head either of real or personal; and in order effectually to be disposed of, the act of disposition must conform to the mode appropriate to the kind of property. What method shall be sufficient to transfer property is matter of positive regulation by law; and it is not in the power of parties to waive or alter, by their private agreement, any of these regulations. These regulations have been adopted with regard not only to the interests of the parties immediately concerned, but also with regard to the interest of others in ascertaining the ownership of property. In regard to realty, a conveyance by metes and bounds of a parcel of land carries with it every thing which the law recognizes as part of the realty, whether it was originally personal in its nature or not, as fully and completely as by the most minute enumeration and specification. It draws to itself and binds every thing afterward made part of the land 'by any method of annexation or affixing which the law recognizes as effectual, whether actual or constructive in character. *Murdock v. Gifford*, 18 N. Y. 30; *Mott v. Palmer*, 1 id. 564; *Leroy v. Platt*, 4 Paige, 77.

In view of these well-settled and universally recognized rules, the cases—such as *Prim v. Emery*, 32 N. H. 484, and *Pinnock v. Coe*, 23 How. 117, which, as well on grounds of reason as authority, labor to maintain that after-acquired rolling stock is bound by a previous mortgage, that in terms is declared to bind such after-acquired property—point irresistibly to the conviction that rolling stock is not part of the realty. No one ever doubted that a mortgage of land bound a house subsequently built upon it; nor that it bound any thing originally personal which became afterward part of the land. The labored attempt to prove that rolling stock, acquired after the date of the mortgage, will be bound by it, shows how strongly the incongruity is perceived of treating it as part of the realty.

The general doctrine is, that things originally personal in their

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nature remain personal, though used in connection with land. All the implements of agriculture have their use only in the cultivation of land ; and yet they are never thought to be part of the realty. Some element of annexation, usually physical in its character, is the common criterion for determining whether things personal in their origin have lost that quality and become part of the realty. Generally, the connection is appreciable by the senses ; so that what belongs to the land and what is personal may be determined by the inspection alone. Cases of constructive annexation are few, and act upon peculiar and obvious reasons of their own. Thus keys, which must be movable to answer their end, and which are a necessary part of the fixed locks to which they are adopted ; sashes and window frames, and the old example of an upper millstone, removed to be picked, illustrate the same principle. Deer in a park, rabbits in a warren, doves in a dovecot, and fish in a pond, depend on a different reason. In these conditions they are reckoned not property at all ; but any of them, caught and secured, becomes at once personal property. Williams on Personal Property, 19. In respect to all cases of constructive annexation, there exist both adaption to the enjoyment of the land and localization in use as obvious elements of distinction from mere chattels personal. Even in respect to cases of actual annexation to the realty and consequent change of character from chattel personal to realty, it is held that there ought to be the concurrence of actual annexation, of applicability to the use to which that part of the realty is appropriated with which it is connected, and lastly an intention on the part of the party making the annexation to make a permanent accession to the freehold. *Potter v. Cromwell*, 40 N. Y. 287 ; *Voorhies v. McGinnis*, 48 id. 278. Looking now at the rolling stock of a railroad it is originally personal in its character, it is subservient to a mere personal trade, the transportation of freight and passengers. The track exists for the use of the cars rather than the cars for the use of the track. There is no annexation, no immobility from weight, there is no localization in use. The only element on which an argument can be based to support the character of realty is adaption to use, with and upon the track. Even in respect to this, were the same contrivance adopted by a tenant for use in his trade upon leased lands, his right to remove both cars and track would be beyond question. It is perhaps fortunate that this question was not finally adjudicated in the early days of railroad enterprise, for

then unity of ownership in track and cars and independence of roads upon each other seemed to render it possible to consider rolling stock part of the realty without introducing great inconvenience. At the present time independent companies exist, owning no tracks, whose trains run through State after State on the railroad track of other companies. It is no uncommon sight to see the cars of a half dozen companies formed in a single train and running from New York to Illinois and Missouri. It is impossible to deal with such property as part of the realty without introducing anomalies and uncertainties of the gravest character. Call cars and engines part of the realty ; where shall they be taxed ? Real estate is to be taxed at its site. What is the site of a railroad train running from New York to Buffalo in a day ? Shall it be taxed in each town where the assessors catch sight of it rushing by at thirty miles an hour ? Or if a judgment be docketed in one country on the line, will its lien attach on each car as it is whirled past ? And how shall conflicting lines in such cases be marshaled ? The difficulties which follow on admitting that rolling stock can be part of the realty are partly disclosed in *Minnehaha Co. v. St. Paul Co.*, 2 Wall. 609. There the court is supposed to have adjudged that a company owning a long line of railroad and all the rolling stock upon it may assign particular portions of rolling stock to particular parts of the road and mortgage such parts of the road with their particular portion of rolling stock ; that whether this had been done was a question of intention, and that in the case before the court it had been done. But upon examining the case it will be found that it was so decided by the district court in another suit, the decree in which bound the parties then before the court, and concluded then that the question spoken of could not be adjudicated (p. 636). To this judgment thereof the justices dissent, and in expressing their views say, " we agree that the rolling stock upon this road covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road ; in other words, is, in technical language, a fixture to the road, so far as in its nature and use it can be called a fixture." But it is a fixture extending over the entire track of the road. It is not a fixture upon any particular division or portion, but attaches to every part or portion.

While I can see that views like these are accommodated to rail.

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roads in the character of mortgagors in their relation with the holders of their bonds, they cannot be allowed to prevail without introducing inextricable confusion and uncertainty in respect to the laws of taxation and of judgment liens, and great embarrassment in dealing in respect to this class of property. It is vastly better that changes of this sort, if thought to be needed, should be introduced by legislation. In my judgment, the want of the element of localization in use is a controlling and conclusive reason why the character of realty should not be given to rolling stock of a railroad. For want of that element, rolling stock cannot be subjected to the laws regulating taxation and liens on real property.

For a statement of all the decided cases to 1869, I refer to Redfield on Railways, vol. 2, p. 507, § 235, and notes.

Taking it, then, to be the law, that rolling stock of a railroad does not become part of the realty so as to pass by a conveyance of land as part thereof, the next question is whether the law of 1833 requires a mortgage of such property to be filed where no change of possession takes place. That the case falls within the language of the law is plain. It is universal in its requirement. If this case is to be excepted, it must be either on account of the character of the mortgage or of the property mortgaged, or on account of some provision of the statute law taking away the necessity of filing. A railroad corporation does not differ from any other corporation nor from any natural person in respect to the general obligation to obey the laws. It is just as likely to get a fraudulent credit as any other corporation, and can claim no special immunity. No distinction can be drawn to exclude a railroad corporation from the provision of this statute which would not equally exclude every trading corporation. This is obviously inadmissible.

The language of a general statute is applicable as well to corporations as to natural persons, and they do not need to be named as corporations in distinction from natural persons in order to be bound.

A difficulty is suggested under the second section of the statute as to the place of filing of a railroad chattel mortgage. The mortgage is to be filed in the town where the mortgagor resides, if a resident of this State, and if not a resident, then where the property mortgaged is at the time of the execution of the mortgage. The railroad in question in this case was located entirely in the county of Clinton, and its line was in the four towns of Platts-

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burgh, Beekman, Chazy and Mooers. A filing of a copy of the mortgage in those four towns would have justified any possible view of the requirements of the law. There is certainly no greater difficulty in adjusting the word "resident" to a railroad corporation than there was in applying to a corporation the term "citizen of a State." This the Supreme Court of the United States found no difficulty in doing at an early day. For many purposes a corporation is to be deemed resident where its place of business or chief office is situated, and at most it could only be deemed resident in all the towns in which any part of its line was located. *Buffalo & State Line R. Co. v. Supervisors of Erie*, 48 N. Y. 102 to 104. It is true that this case presented a question of residence in respect to taxation, but the authorities and the reasoning go strongly to show that the rule above mentioned should be deemed to fix its residence for all purposes. There is, therefore, no such incongruity in applying the section in question to railroad corporations as will warrant us to refuse to apply to these corporations the broad and general requirement of the first section, especially as we find that they, in common with all other corporations and natural persons, are within its policy and spirit as well as its exact letter.

In respect to the character of the property mortgaged, no exemption from obedience to the law can be sustained. A railroad and rolling stock may be owned by a private individual by purchase, or may be constructed by a private individual on his own land, and he may take fare for its use, such as he pleases to charge; unless he wants the public power of eminent domain, or the use of public property or easements, he has no occasion to consult any thing but his own will and his own purse about constructing or running a railroad. The character of the property itself cannot, therefore, furnish any exemption from obedience to the law. Nor does the statute authority, conferred by the act of 1850 to mortgage for certain purposes corporate property and franchises, touch the question. The statute is silent as to the manner in which the power shall be exercised. It might as well be argued that a mortgage filed as one of personal property should, by this filing, operate to give priority as one of land, without being recorded, as to maintain the converse of the proposition. The power is given, but to be effectually exercised the method must be pursued which is appropriate to the kind of property. What is real, must be dealt with as real; what is personal, as personal. This view of the statute is confirmed by the

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subsequent statute of 1868, chap. 779, p. 1747, which enacts that mortgages by railroad companies of real and personal property need not be filed as chattel mortgages, if recorded as real estate mortgages, in each county in or through which the road runs.

Taking the law on these points to be as I have thus far stated it, the inquiry still remains to be pursued in respect to the rights of the parties, as affected by the relations of Vilas to the corporation, which was the mortgagor of this property. Vilas was a director of the railroad company during the whole period of the transactions in question. He and his co-directors were together clothed with the power of managing the corporate property and conducting the affairs of the corporation. From this position arose the duty of managing and conducting its affairs to the best advantage, and the obligation not to let the private interests of any individual director compete with his duty toward the corporation. Whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests. He falls, therefore, within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involved in such confidence. *Greenlaw v. King*, 3 Beav. 49, 61; *Gibson v. Jeyes*, 6 Vesey, 278; *Ex parte Lacey*, id. 627.

Nor is it possible to limit the duty of a director of a corporation, in this respect, to the time while he is acting as a director under any special delegation of power, or is in attendance at meetings of the board. Such a limit would deprive the rule of almost all its efficacy, and would facilitate innumerable evasions of its force. That the power of a director to act for or to represent the corporation may be so limited, in respect to its being bound by his acts, does not furnish any ground for saying that his fiduciary character and consequent duties are subject to the same limit. On the contrary, these must be held to continue so long as his directorship continues. He cannot, while director, divest himself of the knowledge which he has acquired in confidence of corporate affairs, or of the value of corporate property, nor be allowed to use it to his own advantage.

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Cumberland Coal Co. v. Sherman, 30 Barb. 568-572, and the cases there cited; *Benson v. Heathorn*, 1 Young & Col. 326.

The application of these principles to the case in hand would lead to the conclusion that Vilas, while director, and in view of that relation only, could not become the purchaser of the property of the corporation, except subject to its right to elect to disaffirm the sale and demand a resale. As director, it was his duty to prevent a sale if possible; and if not, then to endeavor to have the property produce the highest price; and, in order to the attainment of these objects, to use the knowledge he had derived from the confidence reposed in him as director. As purchaser, on the other hand, it was his interest to pay as little as possible, and to use his special knowledge for his own advantage. Actual fraud or actual advantage do not need in such cases to be shown. *Ex parte Lacey*, 6 Vesey, 627, and *Owen v. Foulkes*, stated in note 1 to that case. Vilas, however, was not only a director; he was also the plaintiff in a judgment against the railroad company, and had a clear right to sell, upon execution on his judgment, the personal property of the corporation which was liable to sale on execution. Whether in this right he might not, at a sale under his own or under prior execution, purchase in protection of his own rights as judgment creditors and hold property so purchased absolutely against the company, need not be determined in this case. *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *South Baptist Church v. Clapp*, 18 Barb. 35.

Assuming that he could not, and that it was the right of the railroad company, at its election, to avoid Vilas' purchase and have a resale, the question remains whether the plaintiffs could avail themselves of that right in any case, and, if so, on what terms. The precise proposition, on the part of the corporation, is that the property, sold under the execution and bought by Vilas, should have brought more, and its right is to test this by a resale. Now, until it should have produced an amount exceeding that due upon all the executions, there could have been no surplus to which the corporation could have been entitled, and about which the plaintiffs, under their mortgage, which was a valid lien on the property sold as against the corporation, might have maintained with it a contest. The plaintiffs cannot go beyond their own equitable right, either directly or through the medium of the corporation; and their right does not arise until the executions are satisfied. *Iddings v. Bunn*, 4 Sandf. Ch. 277; 2 Sugden on Vend. (7th Am. ed.) 896, § 34. The

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plaintiff's case is not framed or put upon any such ground; and we are, therefore, not called upon to consider what might have been their rights upon an offer to pay up the judgments on a condition of Vilas submitting to a resale. Under these circumstances the judgment of the general term of April 6, 1868, affirming that of the special term of January 24, 1867, ought to be reversed.

The exceptions of the plaintiffs to the report of the referee ought to be allowed, and the report of the referee as to its conclusion should be affirmed, but without costs to the defendants or any of them.

REYNOLDS, C., dissented.

So ordered.

JOHNSON, appellant, v. ALBANY AND SUSQUEHANNA RAILROAD COMPANY.

(54 N. Y. 416.)

Statute of Limitations — bar of, does not operate as payment.

E. subscribed for twenty shares of the capital stock of a railroad company, amounting to \$2,000, and paid all but \$1,000. The company brought an action against E. for the balance due on his subscription. E. successfully interposed the statute of limitations, in respect to \$800 of the amount claimed. Plaintiff, the receiver of the estate of E., afterward commenced an action against the railroad company to compel it to issue the twenty shares subscribed for by E. *Held*, that the statute of limitations did not pay the subscription, and plaintiff was not entitled to the relief demanded.

ACTION by Robert T. Johnson, receiver, etc., of John Edgerton, against the Albany & Susquehanna Railroad Company to compel defendant to issue to him a certificate for twenty shares of its capital stock, amounting to \$2,000. The facts appear in the opinion. The plaintiff obtained judgment. The general term reversed the judgment, and ordered a new trial. The plaintiff appealed to this court.

Amasa J. Parker, for appellant. The defendant could not sue for the installments and also exact a forfeiture. *Small*

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v. *Herk. Mfg. Co.*, 2 N. Y. 330-341; *Giles v. Hutt*, 2 Railway Cas. 505; 3 Exch. 18; *Cobden v. Eldredge*, 15 Johns. 220; *U. Turn. Co. v. Jenkins*, 1 Caines' Cas. in Er. 86, 95; *The Franklin Bridge Co.* 2 Bibb, 576; *River Nav. Co. v. Neale*, 3 Hawks. 520. Neither a tender nor offer to pay was necessary to sustain this action. *Bruce v. Tilson*, 25 N. Y. 194; *Beach v. Cooke*, 28 id. 508; *Schemerhorn v. Talman*, 14 id. 143; *Miner v. Beekman*, 11 Abb. (N. S.) 147; *Beecher v. Ackerman*, 1 Robt. 38.

N. C. Moak, for respondent. The statute of limitations barred the remedy only; the debt or liability remains, and is not extinguished. *Waltermire v. Westover*, 14 N. Y. 20, 21; *Watkins v. Stevens*, 4 Barb. 178, 179; *Phillips v. Peters*, 21 id. 351, 358; *Winchell v. Bowman*, id. 448; *Higgins v. Scott*, 2 B. & A. (22 E. C. L.), 413; *Crickett v. Davis*, 21 Pick. 410; *Courtenay v. Williams*, 3 How. 551, 552; *Shears v. Hartley*, 3 Esp. 81; *Jones v. Mer. Co.*, 4 Rob. 227; *Heyer v. Pruyn*, 7 Paige, 465; *Morey v. Farmers, etc.*, 14 N. Y. 302; *Lawrence v. Ball*, id. 477. Plaintiff was bound to offer to pay the amount due and unpaid before bringing the action. *Seagrove v. Pope*, 1 D. G., McN. & G. 783; *Mossley v. Baker*, 6 Hare, 87; affirmed 18 L. J., Ch. 457.

REYNOLDS, C. In June, 1852, John Edgerton, who is represented by the plaintiff in this action, subscribed for twenty shares of the capital stock in the defendant's company, and paid ten per cent at the time, and agreed to pay the balance when called for by the defendant's directors. In the month of May, 1853, the directors of the defendant called for the payment of a further ten per cent on the first of September next following, and thereafter ten per cent every sixty days until the whole amount subscribed for was fully paid. Edgerton paid the second installment of \$200 on the 20th of April, 1855, and the third, fourth and fifth, amounting in the aggregate to \$600, on the 1st day of May, 1860. Edgerton declining to make any further payments, the defendant, on the 12th of December, 1860, commenced an action against him for the balance upon his subscription, being in the aggregate the sum of \$1,000. In that action Edgerton interposed the defense of the statute of limitations, and on that issue succeeded as to every installment but the tenth, and for that \$200, interest and costs,

judgment was rendered against him. This left \$800 due upon his subscription, unless it was paid by the judgment in the action referred to, upon the successful plea of the statute of limitations. Edgerton having apparently fallen into some pecuniary disaster, the plaintiff, as receiver, became vested with his legal and equitable interest, and he now appeals to a court of equity for a certificate of twenty shares of the capital stock of the defendant's company, when, in fact, at least \$800 and interest remains unpaid, and is to be regarded paid, if at all, only by a fiction of the law. If the law shall determine that the judgment relied upon has paid the debt, so that the plaintiff is entitled to the same equitable remedies as if he had in fact paid the amount due, it must be so adjudged, and he must be awarded his remedy.

In my judgment, the claim of the plaintiff is not supported by any principle that should give it any consideration in either a court of law or equity. The statute of limitations never paid a debt, although it barred a remedy. *Dean v. Hewit*, 5 Wend. 257; *Pinkerton v. Bailey*, 8 id. 600; *Soulden v. Van Rensselaer*, 9 id. 293; *Sands v. Gelston*, 15 Johns. 511; *Bell v. Morrison*, 1 Peters, 351; *Carshore v. Huyck*, 6 Barb. 583. The moral obligation to pay always remains, although the remedy cannot be enforced in the courts. This moral obligation was always a good consideration for a subsequent promise to pay. *Vide cases supra*; also *Ehle v. Judson*, 24 Wend. 97; *Scouton v. Eislord*, 7 Johns. 36; *Shippey v. Henderson*, 14 id. 178; *Ingersoll v. Rhodes*, Hill & D. Supp. 371. Some distinction has been suggested, mainly upon a question of pleading, between a debt barred by the statute of limitations and the obligations of a debtor discharged under the insolvent laws; but it is, I think, nowhere held that a debt is paid because the remedy of the party to enforce it is suspended or gone. At all events, it is not too much to say that a party who claims to have paid a debt by a successful plea of the statute of limitations, and seeks an affirmative remedy on the ground of such a fortunate venture, is not to be regarded as the especial favorite of a court of equity.

I am not able to discover any difference in the effect to be given to the allegation that a remedy has been barred by the statute of limitations, whether it is proved by parol evidence or established by the record of a judgment. In either case the fact is precisely the same, and the mode of proof does not appear to be material. The judgment could only be the more effective if it extinguished

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the debt or the moral obligation to pay; but by the law of this State it does not have that effect. This statute, it may be suggested, can be used as a shield, but not as an aggressive weapon, and is entirely like the statute giving the presumption of payment in respect to a sealed obligation after twenty years. It is available as a bar to an action, but ineffectual where a party seeks affirmative relief, based upon the fact of payment. Where such relief is sought, payment in fact must be shown. An insolvent's discharge or a successful defense of the statute of limitations will not answer. These principles will be found approved in many adjudged cases. *Waltermire v. Westover*, 14 N. Y. 16; *Morey v. Trust Co.*, id. 302; *Lawrence v. Ball*, id. 477; *Carshore v. Huyck*, 6 Barb. 583, and cases cited.

Whether the stock subscribed for by Edgerton was legally forfeited to the use of the company may present another and different question, which will have to be disposed of when, if ever, it shall arise. If Edgerton or his receiver shall ever pay or offer to pay the \$800 actually due, with interest, and the company should refuse to issue the stock demanded, it may be that other questions will have to be determined. It has been suggested that the plaintiff should be awarded a certificate for twelve shares of stock, for which payment in fact has been made, and that the judgment of the special term might be modified to meet this suggestion. But this cannot be done, as no such question in any form was before the court below. The plaintiff put himself upon the hazard of obtaining eight shares of stock, for which he had in fact not paid and did not propose to pay any money. He never offered to take a certificate for twelve shares, and if he had, we do not propose to consider whether the company would have been bound to issue it. It claimed the power to forfeit the right of the plaintiff to any stock for the failure to pay the balance of his subscription, and attempted to exercise that authority; and the legal effect of that effort we do not consider. It is sufficient for the present that we find satisfactory reasons for affirming the order of the general term and ordering judgment absolute against the plaintiff, with costs.

All concur.

Order affirmed, and judgment accordingly.

COLE, appellant, v. HUGHES.

(84 N. Y. 444.)

Covenant concerning real estate — when personal. Party wall.

V. and D. were owners of adjoining lots, and D. being desirous of erecting a brick house on his lot, entered into an agreement with V. whereby it was agreed that one wall of the house should be a party wall, built one-half on each lot, and V. covenanted that whenever he, his heirs or assigns should use the wall, he or they would pay D. or his assigns for such use. The house was built and the agreement recorded. Subsequently D. assigned the agreement to plaintiff and conveyed his lot to other parties. V.'s lot was conveyed, by various conveyances, to defendant, who built thereon, using the party wall. In an action by plaintiff against defendant for the value of the party wall so used, *held*, that the agreement between V. and D. did not run with the land so as to give a right of compensation in favor of the grantees of D., nor against the grantee of V. or the defendant; and that plaintiff could not recover against defendant, although the latter purchased with constructive notice of the agreement.

ACTION by Ann Cole against John A. Hughes to recover the value of a party wall. It appeared that in 1861, Voorhees and Dean being owners of adjoining lots in Brooklyn, and Dean being desirous of erecting a brick house upon his lot, a written agreement was entered into by them, whereby it was agreed that the western wall of the house should be a party wall, to be built one-half on each lot, Voorhees covenanted that whenever he, his heirs or assigns should use the wall, he or they would pay Dean or his assigns for such use. The house was erected, and the agreement recorded, Dean assigned the contract to plaintiff, and conveyed his lot to other persons. Voorhees' lot passed by various conveyances to defendant, who, in 1867, erected a building, using the party wall in question. The court directed the dismissal of the complaint. The general term affirmed the judgment, and plaintiff appealed to this court.

D. P. Barnard, for appellant. The covenant on the part of Voorhees runs with the land, and the defendant is bound by it. *Spencer's Case*, 1 Smith's L. C. 22; 4 Kent's Com. (6th ed.), note a, 471; *Dolph v. White*, 2 Kern. 296; Willard's R. E. 416;

Norman v. Wells, 17 Wend. 136 ; *Allen v. Cullver*, 3 Den. 284-296 ; Taylor's L. & T., cap. 7, § 2, 912-916. Plaintiff has a right to maintain this action. *Bullock's Admrs. v. Peck*, 2 Duer, 98 ; *Norman v. Wells*, 17 Wend. 149 ; *Curtis v. White*, 1 Clark's Ch. 389 ; *Todd v. Stokes*, 10 Barr. (Penn.) 155 ; *Gilbert v. Drew* id. 219.

James L. Campbell, for respondent.

EARL, C. By the agreement of July 1, 1861, the parties agreed that the wall, then being built, should be and remain a party wall. Voorhees assented that Dean might erect the wall for their common benefit, and that whenever he, his heirs or assigns should use the same, he or they would pay him, his heirs or assigns for such part of the wall as should thus be used. Subsequently Dean conveyed his lot to one person, and his right to compensation for the use of the party wall under the agreement to another, under whom the plaintiff holds.

The first question to be determined is, whether the right to compensation is in the plaintiff or in the owner of the lot. It is claimed that it passed to the grantee of the lot or the ground, that the covenant to pay ran with the land. To this I cannot assent. When Dean conveyed he conveyed all his interest in the lot, and, as appurtenant thereto, in the party wall. For this interest the grantee paid, and he got all he paid for. There can be no reason in equity why he should also receive payment for some portion of the cost of building the party wall. Voorhees covenanted, in a certain event, to pay this to Dean. It was a chose in action which was due or might be due him. It was in no way attached to the Dean lot. The money to be paid was not for any thing done upon the Dean lot, but for something which had been done upon the Voorhees lot, and it no more passed to his grantee, than it would if he had built a house upon the Voorhees lot, using the party wall, and Voorhees had agreed to pay him whenever he or his heirs or assigns should use or occupy it. The covenant to pay was in no sense for the benefit of the Dean lot, but solely for the benefit of Dean, and therefore did not pass to the grantee of the lot. It was so held in Pennsylvania in *Todd v. Stokes*, 10 Penn. St. 155 ; *Gilbert v. Drew*, id. 219 ; *David v. Harris*, 9 id. 503. These cases expressly hold that the right to

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reimbursement, for the use of a party wall, is personal to the first builder, and does not pass by his grant of the lot, house and appurtenances. It is claimed, however, that these cases were based upon a special statute of that State which altered the common-law rule. The statute referred to was passed February 24, 1721, and provided that "the first builder shall be reimbursed for one moiety of the charge of the party wall, or for so much as the next builder shall use, before he breaks into the wall." This statute imposed upon the second builder the liability to pay in the absence of any agreement to pay, and under this statute the courts held that the right to compensation was a mere chose in action, and did not pass from the first builder by his mere grant to the land. But I do not think this holding was based upon the wording of the statute. That gave the right to compensation, and then the courts held that this right was of such a nature as not to pass by the grant of the land. So here the agreement provides for the same thing that the statute did in those cases, and for precisely the same reason the right to compensation was personal to Dean, a mere chose in action, which did not pass to his grantee of the land. I find no authority in conflict with this conclusion unless it be the case of *Burlock v. Peck*, 2 Duer, 90, and with the reasoning of the learned judge who wrote the opinion in that case I am not entirely satisfied.

The next important question to be considered is, whether the agreement of Voorhees to compensate Dean run with the Voorhees lot, so as to bind his subsequent grantees. I do not think it did. At the time Voorhees made the covenant he received no interest in land, and granted none. He simply assented that Dean might build one-half of the wall upon his land, and then he agreed in a certain contingency, which might or might not happen, that he would compensate him. He did not convey to Dean any land upon which the wall was built. They continued to own the land, as before, in severalty, and, except for the agreement, Voorhees could have used the party wall at any time without making compensation. *Sherred v. Cisco*, 4 Sandf. 480; *Partridge v. Gilbert*, 15 N. Y. 601; 2 Washburn on Real Property, 334.

Dean's right to compensation was in no way charged upon the Voorhees lot. There was, therefore, no privity of estate between Voorhees and Dean. There was simply privity of contract between them, and upon that relation alone could Dean enforce the covenant. Upon such a state of facts it is too clear, upon authority, to be

doubted that the burden of the covenant did not run with the Voorhees lot. It is far from being true, as seems to be claimed by the learned counsel for the appellant, that a covenant always runs with the land when it affects and has distinct relation to it.

There is a wide difference between the transfer of the burden of a covenant running with the land, and of the benefit of the covenant, or in other words, of the liability to fulfill the covenant, and of the right to exact its fulfillment. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor and covenantee at the time when the covenant is made.

The obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate. *Hurd v. Curtis*, 19 Pick. 459; *Harsha v. Reid*, 45 N. Y. 415; *Keppell v. Bailey*, 2 Myl. & K. 517; 1 Smith's Leading Cases; English and American Notes to Spencer's Case; 2 Washburn on Real Property, 262 and 263. In *Hurd v. Curtis*, WILDE, J., declared that the rule, that no covenant can run with the land so as to bind the assignee to perform it, unless there was a privity of estate between the covenantor and covenantee, was without exception. Washburn, in his learned work, says, "that when one who makes a covenant with another in respect to land, neither parts with nor receives any title or interest in the land at the same time with and as part of making the covenant, it is at best a mere personal one, which does not bind his assignee; and that such covenants, and such only, run with land as concern the land itself, in whosoever hands it may be, and become united with, and form a part of the consideration for which the land or some interest in it is parted with between the covenantor and covenantee." And he illustrates the rule by saying, "when one of two adjacent owners of land covenanted with the other that, if he would erect a party wall between their estates, the former would pay the latter for one-half of it whenever he should use it, it was held to be a personal covenant, and not to run with the land so as to bind the purchaser of the covenantor's land, who should erect a building against the party wall," citing *Black v. Isham*, 16 Am. Law. Reg. 8, decided in the Supreme Court of Indiana, and *Weld v. Nichols*, 17 Pick. 543.

It is clear, therefore, that the plaintiff must fail to recover upon

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the covenant, unless there is something in the claim that the defendant is liable, because he purchased with constructive notice by the record of Voorhees' covenant. Even if he purchased with such notice, he did not become liable in an action at law upon the covenant. In *Keppell v. Bailey, supra*, Chancellor BROUGHAM says: "The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorizes him to affect by his contracts, had attempted to create a real burden upon property which is inconsistent with the nature of that property, and unknown to the principles of the law, cannot bind such assignee by affecting his conscience." See also 1 Smith's Leading Cases, note to Spencer's Case, 133.

I am of opinion, therefore, that neither the benefits nor burdens of this covenant run with the land, and that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HOLT v. ROSS, appellant.

(54 N. Y. 412.)

Agency—undisclosed principal—when express company liable for money collected on forged draft.

Defendant, an express company, received for collection a draft drawn upon the plaintiff, presented it for payment and received the money thereon, without disclosing its agency to plaintiff. The payee's indorsement had been forged upon the draft, and the plaintiff was afterward compelled to pay the amount thereof to the payee. In an action to recover the amount paid to the defendant, *held*, that the plaintiff could recover on the ground that the defendant did not, at the time, disclose its agency. REYNOLDS, C., dissented.

ACTION by Robert S. Holt *et al.* against Elmore P. Ross, President of the Merchants' Union Express Company, to recover back the amount paid to the express company on a draft or bill of exchange, upon a forged indorsement. The referee found that plaintiffs were indebted to Lamb, Quinlan & Co., of New Orleans, in the sum of \$771.45; that they drew a draft on plaintiffs for this sum, payable to the order of T. D. Ford, and sent it by mail to said Ford

at St. Louis, Mo.; that the draft was not received by Ford, but was taken by some person unknown and the name of "Thos. D. Ford" forged on the back of the draft; that the draft so indorsed was presented by the Merchants' Union Express Company to plaintiffs who were without knowledge of the signature of Ford, and who paid the amount of the draft; that plaintiffs were afterward compelled to pay the amount of the draft to Lamb, Quinlan & Co.; and that defendant acted in good faith and had no suspicion of the forgery. The referee decided that in the absence of any evidence that the express company disclosed to plaintiffs that it was acting as agent of any other person, in the collection of the draft, the defendant was liable to plaintiffs for the amount so paid. Judgment was entered accordingly. The general term affirmed the judgment and the defendant appealed to this court.

Rollin Tracy, for appellant. Plaintiffs' acceptance and payment of the draft was a guaranty to defendant of all the signatures on it. *Merch. Bk. v. N. J. Tr. Co.*, 6 How. (U. S.) 344; *Stoddard v. L. I. R. R. Co.*, 5 Sandf. 187. The company, on paying the money to its principal, was discharged of its obligation and liability. *Sweet v. Barney*, 24 Barb. 538; *Bk. of Com. v. Union Bk.*, 3 N. Y. 230; *Turnbull v. Bowyer*, 40 id. 456; *Price v. Neal*, 3 Bur. 1354; *Goddard v. Merch. Bk.*, 4 id. 149; *Hoffman v. Bk. of Milwaukee*, 12 Wall. 186, 189, and cases cited; *Price v. Neal*, 3 Bur. 1354; *Fitch v. Jones*, 5 El. & B. 238; *Asbourn v. Anderson*, 1 Ad. & El., N. S., 498; *Wilkeson v. Luterige*, 1 Strange, 648; Story on Bills, § 262; Story on Prom. Notes, 135, 379, 380, 387; Edwards on Bills and Prom. Notes, 308, 309, 310.

Robert Jackson, for respondents.

EARL, C. The express company, when it presented the draft to the plaintiffs for payment and received payment, did not disclose its agency; therefore it is liable, as if actually principal in the transaction. It was so decided in *Canal Bank v. Bank of Albany*, 1 Hill, 287. It was not sufficient that the defendant acted as agent to shield itself from liability, it should have disclosed its agency. Such is the rule as to all agents. To shield themselves from liability for their acts they must give the names of their principals.

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Such is the rule in reference to the transfer of negotiable paper. If the transferrer be only an agent, if he did not at the time disclose the name of his principal, and the bill or note proves to be a forgery, he is personally liable for the consideration received. *Gurney v. Wormsley*, 4 El. & B. 138; *Morrison v. Currie*, 4 Duer, 79; 2 Parsons on Notes, 38.

It matters not that the general business of the express company was to act as agent for others. It could have owned this draft and have collected it as principal. Knowledge in plaintiffs that defendant might have acted as agent was not enough; and it was not the duty of the plaintiffs to inquire, before paying, whether the defendant was acting as principal or agent. It was the duty of defendant, if it desired to be protected as agent, to have given notice of its agency. The drawees of a draft are supposed to know the signature of the drawer, but are not supposed to have the same knowledge of the signature of an indorser. By acceptance and payment the drawees do not admit or guaranty the genuineness of the indorsement by the payee. *Canal Bank v. Bank of Albany*, *supra*; 1 Parsons on Notes, 323; *id.* 590.

This is, therefore, a clear case for affirmance.

REYNOLDS, C., dissented.

Judgment affirmed.

ELMORE, appellant, v. SANDS.

(34 N. Y. 522.)

Carrier—Limitations on railroad tickets—"good this day only."

Plaintiff purchased a ticket of a railroad company marked on its face "Good this day only," and with the date of issue stamped on the back. He did not attempt to use the ticket until seven days afterward, when he presented it to the conductor in the train, but refused to pay his fare. The conductor then ejected him from the train, in accordance with the company's regulation. *Held*, that the conductor was not liable to plaintiff in damages.

A limitation on a railroad ticket that it shall be "Good this day only" is reasonable and valid.

ACTION by James H. Elmore against Lewis S. Sands, a conductor on the Long Island railroad, to recover damages for forcibly eject-

ing plaintiff from a train of that road. The facts appear in the opinion. The judgment was in favor of defendant. Plaintiff appealed to this court.

Samuel Hand, for appellant. Plaintiff's ticket was not a contract, but simply a token of the payment of his fare. *Quimby v. Vanderbilt*, 17 N. Y. 808; *Van Buskirk v. Roberts*, 31 id. 661; *Blossom v. DeId*, 43 id. 264; *Rawson v. Penn. R. R. Co.*, 48 id. 212; S. C., 8 Am. Rep. 543; *Prentice v. Decker*, 49 Barb. 21; *Lunburger v. Westcott*, id. 233; *Brown v. Erie R. Co.*, 11 Cush. 97. The words "good for this date only," refer to the date when plaintiff commenced his trip. *Pier v. Finch*, 24 Barb. 514. The limitation was unreasonable and void. *Beebe v. Ayres*, 28 Barb. 279; *Laws* 1867, chap. 49.

A. J. Vanderpool, for respondent. Plaintiff's ticket was a contract which entitled him to ride on the day of its date only. *Barker v. Coffin*, 31 Barb. 556, 559; *Boyce v. H. R. R. Co.*, 61 id. 611; *B. & L. R. R. Co. v. Proctor*, 1 Al. 267; *North. R. R. Co. v. Page*, 22 Barb. 130; *Cheney v. B. & M. R. R. Co.*, 11 Met. 121; *Beebe v. Ayres*, 28 Barb. 275; *State v. Overton*, 4 Zab. 435; *McClure v. P. W. & B. R. R. Co.*, 34 Md. 532; *Compton v. Van Vanvalkenburgh*, 34 N. J. (5 Vroom) 134. A passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected by the carrier. *Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 455; *People v. Caryl*, 3 Park. Cr. 326; *McCarthy v. Dub., W. & W. R. Co.*, (L. R.) 5 Irish Law, 244; *Downs v. N. Y. & N. H. R. R. Co.*, 36 Conn. 287; *Crocker v. N. L. R. R. Co.*, 24 id. 249; *O'Brien v. B. & W. R. R. Co.*, 15 Gray, 20.

EARL, C. On the 16th of November, 1865, the plaintiff purchased, at Jamaica, a ticket for Hunter's Point upon the Long Island railroad. Upon the face of the ticket was printed, "Good this date only," and upon the back was stamped the date when it was issued. When the plaintiff purchased the ticket he intended to make the trip on that day, but his journey becoming unnecessary, he kept the ticket until the 23d of the same month, when he entered the cars at Jamaica to go to Hunter's Point. When called upon by the defendant as conductor for his fare, he produced the ticket; the defendant declined to receive the same on the ground

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that it had been issued some days before, and demanded of the plaintiff the payment of his fare, and the plaintiff refusing to pay, the defendant, using no unnecessary force, and in obedience to the regulations of the company, put him off from the train.

Upon these facts the judge at the circuit directed a verdict for the defendant, and the question for our consideration is, whether he erred in this direction. Railroad companies carrying passengers have the right to make reasonable rules and regulations for conducting their business, and they and their agents incur no liability in enforcing them in a proper manner. It does not appear that the plaintiff was obliged to purchase the ticket before he could enter the cars. He had his option either to pay upon the train or to purchase the ticket and exhibit that as evidence of his right to ride. The railroad company was not bound to issue the ticket in advance of the day on which it was to be used, and had the right to insist and provide that it should be used on the day when it was issued. It had the right to make a rule that every passenger, when he entered the train, should pay his fare or produce a ticket showing his right to ride upon that train. Such a regulation is neither unreasonable nor illegal. It is not an uncommon one, and it is not important that we should perceive all the purposes which it subserves. It is sufficient that it is apparently useful for some purposes. If the ticket be required to be used on the day it is issued, the passenger cannot well use it for more than one trip, and the railroad company will have some information of the number of passengers to provide for on any day. Without such a limitation a conductor might, for aught I can see, permit a passenger to ride for several days, and then take up and return the ticket.

In enforcing this regulation, therefore, the defendant incurred no liability, and this conclusion is reached whether we regard the ticket as evidencing a contract or as a token merely. If the former be the case, then, by the terms of the contract, it was good only for a passage on the day of its date; if the latter, then the plaintiff was bound to pay his fare, as he had no token showing that he was entitled to a ride in that train. I am, however, of the opinion that the ticket was, as claimed by the learned counsel for the appellant, a mere token or voucher, showing that the plaintiff had paid his fare and was entitled to a passage as thereon indicated. *Quincy v. Vanderbilt*, 17 N. Y. 306; *Van Buskirk v. Roberts*, 31 id. 661; *Rawson v. Penn. R. R. Co.* 48 id. 212; S. C., 8 Am. Rep.

543 These views are not in conflict with the decisions made in *Blossom v. Dodd*, 43 N. Y. 264; S. C., 3 Am. Rep. 701; and *Rawson v. Penn. R. R. Co.*, *supra*. In those cases the plaintiffs were sought to be held to contracts of which they knew nothing, and to which they had not expressly or impliedly assented. Here the words "good this date only" were plainly printed on the face of the ticket; the plaintiff had had the ticket in his possession for several days, and there is no proof that he did not know its terms. He must be presumed to have known them. But, whether he did or not, he knew that he was bound to pay his fare or present a suitable voucher. A passenger should see to it, if he prefers not to pay in the cars, that he has a proper voucher. If he does not, he cannot complain if the conductor, in obeying the regulations of his company, puts him off the train.

The conclusion I have thus reached is sustained by the following authorities; *Boston and Lowell R. R. Co. v. Proctor*, 1 Allen, 267; *Barker v. Coffin*, 31 Barb. 556; *Boice v. The Hudson River Railroad Co.*, 61 id. 611; *Shedd v. The Troy and Boston Railroad Co.*, 40 Vt. 88; *Dietrich v. Pennsylvania Railroad Co.*, 71 Penn. St. 433; S. C., 10 Am. Rep. 711; and many other analogous cases.

The judgment must be affirmed, with costs.

All concur; LOTT, Ch. C., not sitting.

Judgment affirmed.

WILLIAMS V. FIREMAN'S FUND INSURANCE COMPANY, appellant.

(54 N. Y. 509.)

Fire insurance — construction of policy.

A policy of fire insurance contained a provision that if petroleum should be stored in the insured premises without written permission, the policy should be void. *Held*, that this did not apply to the keeping of petroleum in small quantities for the medicinal purposes of the insured.

ACTION by Lewis Williams against the Fireman's Fund Insurance Company, upon a policy of fire insurance. The facts appear in the opinion. The plaintiff obtained a judgment, which was affirmed at general term. The defendant appealed to this court.

Samuel Hand, for appellant. The keeping of petroleum was prohibited by the policy. *Jones v. Firemen's Fund Ins. Co.*, 51

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N. Y. 318; *Hynes v. Schenectady Mut. Life Ins. Co.*, 11 id. 561. The clause was an express warranty. *Duncan v. Sun Fund Ins. Co.*, 6 Wend. 434; *Gates v. Ins. Co.*, 5 N. Y. 469; *Mann v. Ins. Co.*, 7 id. 530.

John E. Parsons, for respondent, cited *N. Y. Eq. Ins. Co. v. Langdon*, 6 Wend. 623; *Rafferty v. Ins. Co.*, 3 How. 480; *Moore v. Ins. Co.*, 29 Me. 97; *O'Neill v. Ins. Co.*, 3 N. Y. 122; *Vogel v. Geo. Mut. F. Ins. Co.*, 9 Gray, 23; *Mayor, etc., of N. Y. v. Hanover Ins. Co.*, 10 Bosw. 557.

REYNOLDS, C. On the 6th of December, 1867, the defendant insured the plaintiff in the sum of \$2,500, for one year, on office furniture and fixtures, and merchandise, hazardous and extra hazardous, contained in the building situate at Nos. 307 and 309 on Broadway, in the city of New York. It was provided in the policy, that if the premises should be used for the storing or keeping therein any articles, goods or merchandise, denominated hazardous or extra hazardous or specially hazardous, except as specially provided for in the policy, so long as the same continued the policy was to be of no force. There was a further provision, that "if petroleum, rock oil, earth oil, benzole, benzene or naphtha, shall be stored in said premises without written permission therefor indorsed on this policy, this policy shall be absolutely null and void."

Another clause in the policy provided that "the following trades, occupations and merchandise add to the rate of the building and its contents fifty cents or more per \$100, and, to be covered, must be specially written in the policy: burning fluid, camphene." Also, "camphene, spirits, gas or 'burning fluid,' or any similar inflammable fluid when used in stores, warehouses, shops or manufactories as a light, subjects the goods therein to an additional charge, and such use renders this policy void, unless permission therefor shall be indorsed in writing hereon."

There was also the common provision that, in case the risk should be increased by any means within the control of the insured, or by the occupation of the premises for more hazardous purposes than permitted by the policy, then the policy should be void.

A motion for a nonsuit on the trial was denied, and upon the close of the evidence the case was submitted to the jury, and a verdict returned for the plaintiff.

The defense was rested upon the fact that the plaintiff, who had been in the army during the late war, and had received a gun-shot

wound resulting in a cutaneous disorder, which he treated by an application of crude petroleum oil to the surface of his body. For this purpose, the plaintiff kept crude petroleum in a jug upon a shelf in his room, and some quarts of it were in the building at the time of the fire, and with it a shirt and a pair of drawers, which the plaintiff had worn after applying the oil, were found the morning after the fire. They had not been touched by the fire which occurred on the night of January 31, 1868, and it is not claimed they, in any way, contributed to it; but this circumstance is quite immaterial, if having petroleum there in any quantity and for any purpose violated the contract of insurance.

It is very clear that, when the policy was written, no one understood that the keeping of petroleum oil for merely medicinal purposes would render void the obligation of the defendant. The provision against "storing or keeping" was obviously aimed at storing or keeping in a mercantile sense, in considerable quantities, with a view to commercial traffic. It was not intended to forbid its use as a medicine. It might as well be claimed that if the plaintiff went to his medical adviser and had his shirt and drawers saturated with petroleum, with a view to the peaceful repose of a night, and brought them to bed on the insured premises, or if, indeed, he had taken a quantity internally, for a like purpose, it would have been a "keeping or storing" within the meaning of the policy. The cases in the courts, in principle, against the construction contended for by the defendant, are quite too numerous to authorize us to disturb the judgment of the court below. *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *Reynolds v. Commerce Ins. Co. of N. Y.*, 47 id. 597; *Cotton v. Springfield Ins. Co.*, 1 Sumner, 484; *N. Y. Equitable Ins. Co. v. Langdon*, 6 Wend. 623.

The point, that the plaintiff had, during the life of the policy, used some inflammable fluid for light, does not appear to have the slightest foundation. The restriction clearly did not apply to using a light in a sleeping apartment, but only to the use of camphene, etc., as a light for stores, warehouses, shops and manufacturing. Besides, the plaintiff's evidence indicates that he had not used any forbidden light during the life of the policy, and, as the defendant on the trial did not ask to have any such question of fact submitted to the jury, it may be assumed that counsel then thought, as we think now, that there was nothing in the point.

The judgment must be affirmed, with costs.

Judgment affirmed.

TRIMM, appellant, v. MARSH.

(54 N. Y. 393.)

Mortgage — equity of redemption — sale of on execution.

A mortgagee of real estate, in possession after default, may cause the equity of redemption of the mortgagor to be sold on execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage.

ACTION by George S. Trimm and others against Sarah Ann Marsh and another for the recovery of mortgaged premises. It appeared that in 1858 one Ridgway mortgaged the premises in question to an insurance company, to secure the payment of \$2,000. The insurance company assigned the mortgage to defendant, Sarah A. Marsh. The mortgagor conveyed the premises to plaintiff Brown, who in 1865 entered into an agreement with plaintiff Trimm, to convey the premises to him. Defendant Sarah A. Marsh had previously gone into possession of the premises by virtue of a decree and sale in foreclosure, which sale was subsequently set aside. Defendant Sarah A. Marsh still retained possession, although a resale was ordered. In 1864 defendant Sarah A. Marsh recovered a judgment against plaintiff Brown, and in 1865 she caused an execution to be issued and a sale to be made of the interest of plaintiff Brown, in the premises. Defendant Sarah A. Marsh became the purchaser, and then conveyed the premises to the other defendant, who had notice of the facts, and who was not a *bona fide* purchaser for value. Defendant Sarah A. Marsh afterward received and transferred the sheriff's deed to the other defendant. The referee decided in favor of plaintiffs, on the ground that the execution sale was void. The general term reversed the judgment entered on the report of the referee and ordered a new trial. The plaintiffs appealed to this court.

Wheeler H. Peckham, for appellants. The equity of redemption of a mortgagor, after default and after the mortgagee has taken possession, cannot be sold on execution. *Waters v. Stewart*, 1 Cai. Cas. 47, 57; *Francis v. Nash*, Hard. 53; *Impey on Sheriffs*, 157;

Denton v. Livingston, 9 Johns. 96; *Baxter v. Gilbert*, 12 Abb. Pr. 102; *Mattison v. Baucus*, 1 N. Y. 295; *Bates v. Ripp*, 3 Keyes, 210; *Hitchcock v. Harrington*, 6 Johns. 293; *Collins v. Torry*, 7 id. 282, 283; *Van Duyne v. Thayer*, 14 Wend. 234; 4 Kent's Com. 43-48 (marg.), 8th ed.; 3 R. S. 32, § 7; 4 Kent's Com. 47, note d; *Cooper v. Whitney*, 3 Hill, 102; *Phyfe v. Riley*, 15 Wend. 248; *Jackson v. Willard*, 4 Johns. 41; *Fox v. Lipe*, 24 Wend. 167; *Craft v. Merrill*, 14 N. Y. 456, 460; *Pell v. Ulmar*, 18 id. 140, 142; *Mickles v. Townsend*, id. 584; *Randall v. Raab*, 2 Abb. Pr. 314. The mortgagee, being in possession as such, could not change her title by the enforcement of general liens on the property, or by acquiring titles, the effect of such liens. Blackwell on Tax Titles; *Burhans v. Van Zandt*, 3 Seld. 525.

Justus Palmer, for respondent.

EARL, C. The only legal proposition involved in this case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold upon execution against him? If this question be answered in the affirmative, the decision of the general term was right and must be affirmed.

The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

These equitable principles have had an increasing influence upon courts of law, and Chancellor KENT says that "the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." 4 Kent's Com. 158.

The common-law rule, as modified by the equitable principles above alluded to, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely invested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England States, and in many of the other States of the Union. But this common-law rule has never, to its full extent, been adopted in this State. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature. *Waters v. Stewart*, 1 Caines' Cases in Error, 47; *Jackson v. Willard*, 4 Johns. 42; *Runyan v. Mersereau*, 11 id. 534; *Astor v. Hoyt*, 5 Wend. 603; *Packer v. Rochester and Syracuse Railroad Co.*, 17 N. Y. 283-295; *Kortright v. Cady*, 21 id. 343; *Power v. Lester*, 23 id. 527; *Merritt v. Bartholick*, 36 id. 44.

Prior to the Revised Statutes the mortgagee could maintain ejectment to recover the mortgaged premises. This right has been taken away (2 R. S. 312), and now the mortgagor, both before and after default, is entitled to the possession of the premises, of which he cannot be deprived without his consent, except by foreclosure. It is not disputed that before possession taken by the mortgagee the mortgagor has an interest in the real estate which can be sold upon execution; that his widow is entitled to dower; that he can convey and devise his interest as real estate; that at his death it descends to his heirs; that he has every attribute and right of an absolute owner of the real estate, subject to the lien of the mortgage, and that his title can be defeated only by foreclosure. It is not disputed that the mortgagee before possession taken has only a chose in action; that he holds the mortgage only as security for the debt; that he can sell the bond and mortgage by mere delivery as personal property; that at his death they pass to his personal representatives as a portion

of his personal estate; that he has no such estate in the land as can be sold on execution, or as can give his widow dower; and that he has no attribute of ownership in the land. It was said by Judge JAMES, in *Power v. Lester, supra*, that "a mortgage is a mere security, an incumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on an execution." Judge PRATT says, in *Packer v. The Rochester & Syracuse Railroad Company, supra*, that a "mortgagee has a mere chose in action, secured by a lien upon the land. Since the Revised Statutes there is no attribute left in the mortgagee, before foreclosure, upon which he can make any pretense for a claim of title. For the mere right, when he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title. He would have the same right in case of a pledge."

At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a reconveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such case a reconveyance was necessary; and such is still the rule in England and in many of the States of the Union. But it has always been the law of this State that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as expounded by our courts. So that here the term "law day," which occupies such a prominent place in the early discussions as to mortgages, has no particular significance. The mortgagor has his "law day" until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this State to call the mortgagor's right in the land, before or after default, an equity of redemption; a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this State the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate.

But it is claimed by the learned counsel for the appellants that

the position of the mortgagee is materially changed when he gets possession. It is true, notwithstanding the provision of the Revised Statutes which prohibits an action of ejectment by the mortgagee to obtain the possession of the mortgaged premises, that after he has lawfully obtained the possession he may retain it until the debt secured by the mortgage has been paid. Before taking possession the mortgagee has no title in the lands. How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor's title would go to his heirs. Payment, or even tender, would destroy the mortgagee's right to retain possession, and would enable the mortgagor to maintain ejectment to recover possession. The mortgagee, in such case, so far from having any title, holds the land as the land of the mortgagor, and is liable to account to him for the rents and profits. Judge COMSTOCK, in *Kortright v. Cady*, *supra*, says: "The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the land. The notion that a mortgagee's possession whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but when its object is accomplished it is neither just nor lawful for an instant longer."

I cannot doubt, therefore, that the mortgagor, after default, and after the mortgagee has taken possession, has such an estate in the land as can be sold upon execution. It is not necessary to decide whether, in such a case, the mortgagee has also such an estate in the land as can be sold upon execution, because, if he has, it does

not follow that the mortgagor has not also such a right. They might each own an estate which could be sold. But I am of opinion that the mortgagee has no estate in the land which can be sold on execution. His interest is a mere chose in action, a debt secured by a pledge of real estate. His debt is not merged in the real estate by the possession. He has no interest in the real estate which he can sell, or which can be sold separate from the debt. Such a sale would convey nothing. Whoever took the real estate from him would take it subject to the same liability as he was under to account for the rents and profits to the mortgagor. It has been decided that a transfer of the mortgage without the debt is a mere nullity. *Merritt v. Bartholick, supra*.

The fact that, at the time of the execution sale, the defendants were in possession, claiming the absolute title, can make no difference, as land held adversely to the true owner can be sold upon execution against him. *Tuttle v. Jackson*, 6 Wend. 218 ; *Truax v. Thorn*, 2 Barb. 156.

I am, therefore, of the opinion that the title of the defendant under the execution sale was valid, and that the plaintiff had no right to redeem.

The order of the general term must be affirmed, and judgment absolute rendered against the plaintiffs, with costs.

GRAY, C., dissented.

Judgment affirmed.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

POWELL, appellant, v. Sims.

(S W. Va. 1.)

Easement of light — when sustained.

The English common-law doctrine of Ancient Lights disapproved.

An implied grant of an easement of light will be sustained only in cases of real necessity ; and will be denied or rejected in cases when it appears that the owner claiming the easement can, at a reasonable cost, have or substitute other lights to his building.

BILL for an injunction.

Owen D. Downey owned a property in Piedmont, Mineral county, known as the "Downey House." It consisted of two adjoining buildings, built of brick and wood. The latter had a wing which extended to the rear. On the 29th of March, 1869, he sold to Gilmore F. Sims, the wooden part of the building, and on the 24th of April following he sold to Robert Powell the brick building.

Powell shortly thereafter commenced the erection of a porch from the rear of his brick building along the side of the wooden wing of the Sims building to the street in the rear, and was closing

up the windows in the same. Sims thereupon filed his bill of injunction in the circuit court of Mineral county, in July, 1869, alleging the destruction of his lights, which was the origin of this cause. The deeds to the parties respectively set forth the boundaries of the grounds by metes and bounds, and both parties were aware of the location of the buildings and their situation at the date of their purchases. Neither of the deeds contained any allusion to the subject of lights, or express grant or restriction in relation thereto.

It appeared in the testimony that the ground floor of the wing extending back on the property of Sims was used by him as a kitchen to his hotel, and the second story as chambers for his guests. It further appeared that if the windows on the side next to the yard of Powell were closed up, that they could be transferred to the other or east side of the wing, where they would open upon a porch from which access was had to the rooms.

The circuit court perpetuated the injunction, from which decree the defendant Powell appealed to this court.

George A. Pearre, for appellant.

C. J. Faulkner and *F. M. Reynolds*, for appellee.

BERKSHIRE, P. J. The principles to be settled in this case are certainly important to the parties to be immediately affected by our decision, but they are much more so in their wider application to the citizens at large. And as the rule established in this case is to apply to and govern future cases in this State, the case has been examined and considered with the attention and care which its importance would seem to require. Each of the parties to this controversy claim under deeds from a common vendor, Owen D. Downey, who, it appears, was the owner of both tenements at the time of the sale and conveyance to the appellee, which sale and conveyance were prior to that to the appellant. Downey, it also appears, built both of the houses—the one conveyed to the appellee first—and afterward occupied them together as a hotel. But at the time of, and for some time prior to the sale to the appellee, they were separately occupied by different persons or families and for different purposes. In the deeds to the parties, the boundaries of their respective premises are accurately described by metes and

bounds, and the partition line or boundary between them is called for and clearly defined in each of the deeds. If further appears, that each of the parties examined the premises and had full notice of their location and condition at the time of their purchases. Also that the wing or rear building of the appellee's house extends southward from the main building, along and immediately upon the division line of the two properties, the windows in said wing being in the west side and overlooking the open space and yard of the appellant so conveyed to him by Downey ; and that the appellant, when enjoined by the appellee, was erecting on his own ground a porch extending from his own building along the said wing to the street in the rear of the buildings, which porch, when completed, it is conceded would close up said windows and thereby exclude the flow of light and air through them into the rooms of said wing and rear building. The case was fully and ably argued, and our labors in its examination thereby much relieved and facilitated. On behalf of the appellee it was strongly and earnestly maintained that by his deed from Downey, he acquired by an implied grant an easement of light and air through the windows in controversy, and that a perpetual restriction and incumbrance was thereby imposed on the adjoining property of the appellant, which made it unlawful for him to obstruct and close the windows by the erection of the porch now in dispute. On behalf of the appellant it was insisted, with equal earnestness, that, under the circumstances of this case, no such right or easement under his deed passed to the appellee, and that he had no right, therefore, to hinder or restrain the appellant from making any necessary or useful improvements on his own property, including the porch in controversy. It was also contended by the counsel for the appellee, that this case should be determined upon the doctrine and principles of the common law as established in *England* in reference to easements of light in similar cases. While on the other side it was maintained that the English doctrine as applied to similar cases there, is repugnant to and inconsistent with our institutions and unsuited and inappropriate to the state of things in this country, and ought not therefore to be applied in this instance; and that the rule, as established by the American cases, should be applied to and govern this case. And in my view, our decision must depend mainly on the fact whether we follow the authorities of the one country or the other, For it cannot be questioned, that if we adhere to and are governed

solely by the rule as established and applied under the English authorities, in that country, the appellee here must prevail; while on the other hand, it is clear, that if we adopt and apply the rule as settled by the decided weight of the American cases and authorities, independent of the effect of our registration act, the case must be determined for the appellant. It now, therefore, becomes material to inquire how far we are *bound*, under our constitution, to adopt and apply the English rule; and if not so bound, whether it or the prevailing doctrine as established in this country ought to be applied in this instance. To what extent, then, is the common law of England in force in this State? By section 8 of article 11 of the constitution, it is provided that "such parts of the common law and the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this constitution goes into operation, and not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature." The constitution of the State of Virginia in force at the time of the creation of this State, as well as all previous constitutions of the former State, contained similar provisions adopting the common law so far as its principles were not repugnant to said constitutions. And I believe quite all of the States, by like provisions, have also adopted the common law so far as it is not inimical to their constitutions. But although so adopted, it was early held by the courts of Virginia, as well as of the other States, that the common law was in force in this country only so far as it was in harmony with our institutions, and its principles applicable to the state of the country and the condition of society. 1 Tuck. Com. 8, 9, and authorities cited.

The question of easement of light does not appear ever to have been before the Court of Appeals of Virginia, and being therefore unaided as well as unfettered by any such authoritative adjudication, we are left free to adopt and apply, to the case now under review, such principles consistent with the rights of the parties in the premises, as will in our judgment best comport with the public good and the existing condition of things in this country. The essential inquiry, therefore, now is, what principle ought to govern us under the facts of the case? I have examined with much care and diligence the early English cases, with the view of apprehending, if practicable, the real grounds upon which the doctrine of easement of light, in cases like the present, was originally estab-

ished. My researches have not been successful. The modern English doctrine seems to be founded on the cases of *Palmer v. Fletcher*, 1 Lev. 122; *Cox v. Mathews*, 1 Vent. 239, and *Roswell v. Prior*, 6 Mod. 116, which have been followed by the latter cases. In reference to these cases, it will be found that but a very scanty and confused report of any of them is furnished. The facts are not given in any. None of them seem to have been much discussed or considered, and the opinions of the judge were announced from the bench on the hearing or trial. And from the reports that are given, I think it will be found impossible to glean from them the exact principle on which they were decided. For, whether it was because of an express grant of the light in the deed (which was the usual form of the deeds in that country), or was considered an easement acquired by prescription and was passed as an appurtenance with the tenements; or as an implied grant founded on necessity, or whether it was intended to lay down an arbitrary rule which should be inflexible and without qualifications, cannot be determined. The rule was first laid down by two of the judges, TWYDEN and WYNDHAM, in the case of *Palmer v. Fletcher*, while ELYNGE, J., doubted, and HYDE, C. J., was absent. The proposition decided is briefly stated to be, that "if a man erected a house on his own land, and after, sell the house to one and the lands adjoining to another, the other cannot, by putting piles of timber on his land, obstruct the light of the house, though it be a new house, no more than the builder himself could." And the only reason he (the vendor) "cannot derogate from his grant," "for the lights are a necessary and essential part of the house." The next case (*Cox v. Mathews*) simply adheres to the case of *Palmer v. Fletcher*, and the proposition is stated by Lord HALE, who pronounced the judgment in the same form and nearly in the same language as the first case, assigning no reasons except the remark that it was a plain case, "for the defendant fixed boards to the plaintiff's house." The proposition is also put in the same form and in similar language by HAUTT, Ch. J., in *Roswell v. Prior*, that followed soon after. The controversy in this case was between landlord and tenant, and it is stated in the opinion or judgment, that it was agreed by all the judges that "formerly the way was to declare of ancient lights and ancient messuage, but now that was altered." And *Palmer v. Fletcher* and *Cox v. Mathews* are cited to show that it was necessary in these cases to deed ancient lights

and message. The facts of the case are not given ; but from a note of the reporter, it appears that an objection was raised, by motion in arrest of judgment, after verdict, because the declaration failed to aver *ancient* lights and message, and it was held *by the whole court*, that " being after verdict, it shall be intended that it was given in evidence on the trial that the house and windows were *ancient*." From this it would seem that the cases are mixed up and confused with the early doctrine of ancient lights by prescription, and that even in these cases it was necessary and indispensable to a recovery for stopping the lights, if not to aver it in the declaration, to *prove on the trial* that the house and lights were *ancient*. And it may therefore be, from any thing that appears to the contrary, that in the cases above referred to, the plaintiffs, in the view of the court, had acquired an easement of light by prescription under the statute reducing the period necessary to acquire such right to twenty years, notwithstanding it is said in some of them the right in such cases existed though the house or message be new. A doctrine of so much practical importance thus established, unless founded in wisdom and sound policy, it appears to me would have but little to recommend it to the favorable consideration of courts at the present day, and ought not to be adopted and applied here, unless, on account of its intrinsic worth, it be considered the proper and better rule applicable to the cases in this country. Turning to the American authorities, I think there can be no mistaking the tendency of the cases. It will be found that in nearly all the States in which the question has been raised, the English doctrine of easements of light by prescription, which appears to be as tenaciously adhered to in that country, has been reprobated and discarded altogether as unsuited to our people and condition, and inconsistent with the existing system of registration in this country ; that in a few instances only has the principle established in *Palmer v. Fletcher*, and that class of cases, been acquiesced in and followed, while it has been greatly qualified in most of the cases where the question arose, and limited to cases of strong *necessity*. And there is also a manifest tendency to reject altogether the doctrine of implied grants of easements of light, and limit and confine such rights to *express* grants, so that the rights of the parties would be determined by the face of the deed under which they hold. 2 Washburn on Real Estate, 316, 18, top ; *Myers v. Gemmell*, 10

Barb. 587; *Parker v. Foot*, 19 Wend. 309; *Morrison v. Marquaidth*, 24 Iowa, 35; *Haverstick v. Sipe*, 33 Penn. St. 368; *Mullen v. Strickler*, 19 Ohio St. 135; *Rogers v. Swann*, 10 Gray, 376; *Carrig v. Dee*, 14 id. 583.

The prevailing doctrine here would seem to be, that an implied grant of an easement of light will be sustained only in cases of real and obvious necessity, and will be denied or rejected in cases when it appears that the owner of the dominant estate can, at a reasonable cost and expenditure, have or substitute other lights to his building, so that he may continue and have the reasonable enjoyment of the same; leaving the owner of the servient estate also to the enjoyment of his own property free from the restriction and burden that would otherwise be imposed upon it. In the application of this principle, doubtless, some embarrassment will sometimes be realized in determining the *degrees* of necessity that ought to be required to support the right to the easement, and each case must necessarily be settled on the facts and circumstances surrounding it.

This rule, it appears to me, is dictated by wisdom and sound policy, and sustained by the plainest principles of justice and equity, and ought therefore to be applied and enforced in this country. It is in accordance with the doctrine, long and well established, both in England and this country, in reference to implied grants of easements of ways founded on necessity. 1 Saund. 323, note 6; *Holmes v. Elliott*, 2 Bing. 76; *Procter v. Hodgson*, 29 Eng. Law & Eq. 453; Washburn on Eas. and Sev. 586-7, and authorities there cited. Why should the rule not be the same in both cases? Is there any difference in principle? If, as between coterminous land owners, an implied grant of an easement of way will not be permitted (as is well settled) where the party claiming it can have another way over his *own* property, why, it may with propriety be asked, should it not be so in the case of lights? I can recall no sufficient reason why it should not be the case, and it is conceived none could be suggested. Applying this principle to the case before us, it is easily settled, it being clear from the testimony in the record, that the appellee, for a very moderate and reasonable expenditure, can obtain other lights and air sufficient for the useful and reasonable enjoyment of the property in controversy, by substituting and shifting the windows from the west to the east front of said building; which would, at the same time, leave the appellant to the like use and enjoyment of his own property according to the

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boundaries designated in each of their deeds. And this would seem to accord with the intention and understanding of the parties at the time of their respective purchases, as it appears from the evidence of Stephen W. Downey, that at the time of the consummation of the sale to the appellee, and before the delivery of the deed, he was notified by said Downey, acting as the agent of the vendor, that the brick part of the property was under mortgage, and would have to be sold—and probably to the appellant—and that the vendor would put certain restrictions on the brick property if the appellee would remove certain other restrictions which had been placed on a certain house and lot which had been conveyed by the latter to the former in part payment for the property in dispute, and that the appellee then stated that he had no *right* to place *any* restrictions on the brick part, and the matter had never occurred to him before. And it further appears that certain other easements were secured to the appellee by express stipulations in his deed, which fact of itself has been held to be sufficient to rebut any presumptions of implied easements (such as is claimed here) founded on necessity or otherwise. *Morrison and others v. Marquard*, 24 Iowa, 35. And it may moreover be well doubted whether under our registration act providing that “no estate of inheritance or freehold in lands shall be conveyed unless by deed or will,” any such easements could be acquired except by express grant in the deed. Code, ch. 71, § 1, p. 459. Upon the whole case the decree, in my view, should be reversed, the injunction dissolved, and the bill dismissed with costs to the appellant here and in the circuit court.

Decree reversed.

MOREHEAD V. PARKERSBURG NATIONAL BANK.

(S W. Va. 74.)

Promissory note — alteration.

A material alteration of a promissory note, such as, for instance, changing it to a negotiable note, without the knowledge or consent, either express or implied, of the promisor, vitiates it, although it may be in the hands of an innocent holder.

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ACTION of debt, in the circuit court of Wood county, declaration filed August rules, 1869. Judgment for plaintiff, October, 1869.

A statement of the material matters involved appears in the opinion of MAXWELL, J.

The defendant brought the case here for review.

J M. Jackson, for plaintiff in error.

Okey Johnson, for defendant in error.

MAXWELL, J. The plaintiff brought an action of debt in the circuit court of Wood county, against William H. Morehead and James N. Wilkins, to recover the amount of a supposed negotiable note, executed by the said Morehead to the said Wilkins, and by him indorsed to the plaintiff. Neither party requiring a jury to try the issues in the cause, the court, in lieu of a jury, heard the evidence and rendered a judgment for the plaintiff against Morehead, for the amount claimed in the declaration, Wilkins not being before the court. Morehead thereupon moved the court to set aside the judgment rendered against him, and grant him a new trial in the premises, on the ground that the said judgment was contrary to the law, and the evidence heard at the trial; which motion the court overruled and gave to the defendant a bill of exceptions, in which was certified all the facts proved on the trial. The appeal is from the judgment of the court refusing a new trial. It appears from the bill of exceptions that the note sued upon and in evidence on the trial, was as follows:

“ PARKERSBURG, WEST VA., *July 1, 1868.*


[\$250.]

“ Nine months after date I promise to pay to J. N. Wilkins, or bearer, the sum of two hundred and fifty dollars, with interest at six per cent, from date, until paid, for value received, payable at Second National Bank, Parkersburg, W. Va.

[U. S. stamp,
15 cents.]

“ WILLIAM H. MOREHEAD.”

Indorsement on back of note—James N. Wilkins; and regularly protested for non-payment at maturity. It was proved that the plaintiff had bought said note in the usual course of trade, and that it came to plaintiff's hands in exactly the words and figures in



which it was at the time of the trial, and that it was bought by said plaintiff before maturity. The defendant then proved by himself that the said note was not the note executed by him, but that the same had been altered from a common promissory note to a negotiable note, without his knowledge or consent; that said note was given in part payment for a patent-right for a well bucket, and that at the time the said note was given to the payee named therein, who had sold to the defendant said patent-right, he wanted him to execute a negotiable note for the amount, and that the defendant, Morehead, positively refused to do so, and that the note was then filled up by the payee named therein, it being a printed note down to and including the words "payable at," and the words "Second National Bank" were filled in after the words "payable at," by some one, and that, too, after said note was signed and delivered, and without the knowledge, instance or consent of the defendant, and that the handwriting is the same as the rest of the handwriting in the body of the note; and thus the said note was made negotiable instead of a mere promissory note. It was further proved by another witness, that the payee, or some other person holding said note, had offered to sell the same after its execution and delivery aforesaid, and that it was then a promissory note, and that the party declined to purchase the same because it was not a negotiable note, but a promissory note. It was further proved by said witness that the consideration of said note had wholly failed; that the party was not the owner of what he pretended to sell said defendant, for which said note was given, and that by reason of the change in said note to negotiable paper, he was not permitted to set up and prove the failure of said consideration against the said plaintiff.

There was evidence showing that the defendant had advertised the failure of the consideration for which the note was executed, and some other evidence not material to the inquiry now before us. It is insisted for the bank, upon this state of facts, that the defendant is liable to pay the negotiable note in the record set forth, because the same was acquired by the plaintiff as a bank in the usual course of business, for value, and in good faith, even if the indorser, Wilkins, obtained the same from Morehead unlawfully and by fraud. The first case cited to sustain this position is the case of *Raphael v. The Bank of England*, 33 Eng. Law & Eq. 276. In this case it was held that a party taking a negotiable

instrument, *bona fide*, and for full value, is it, though it has been stolen, and he took was no question as to the genuineness of the only question was as to the liability of the which had been stolen, and passed to the innocent holder thereof for value. The ne of *Swift v. Tyson*, 16 Pet. 1, and *Goodman* 363. The court, in the case of *Goodman* v the case of *Swift v. Tyson*, and repeats wha a *bona fide* holder of a negotiable instrument eration, without notice of facts which impea the antecedent parties, if he takes it under before the same becomes due, holds the title u and may recover thereon, although, as be parties, the transaction may be without any leg not in this case any question as to the proper but the question was as to the consideration for These cases clearly establish the position ma for the bank, provided the contract upon whi tion for which, the note is made or execu It is claimed by the counsel for the bank tha in blank, and indorsed, it may be filled up b a common promissory note or a negotiable no thus signs and indorses it in blank will be liab for value. This is true as a general propos always be either an express or an implied aut

The counsel for Morehead insists that the paper, in this case, after it passed from the a material alteration; that it was made w either express or implied, and that it is the A material alteration, without the assent of t by it, renders the instrument void as to him 35 N. H. 351; 2 Para. on Notes and case of *Tidmarsh v. Grover*, 1 Maule & S drawer of a bill of exchange, accepted, payable indorsed it to plaintiff, erasing the name and substituting Esdaile & Co., in lieu knowledge of the acceptor, it was held that t recover against the acceptor. In the case Eng. Com. Law Rep. 449, a bill of exchange

payable generally, the drawer, without the consent of the acceptor, added the words, "payable at Mr. Bidlake's, 48 Cheswell street," it was held this was a material alteration, and that the acceptor was thereby discharged. In the case of *Burchfield v. Moore*, 25 Eng. Law & Eq. Rep., 123, where a bill of exchange was, without the privity of the acceptor, altered by inserting the words, "payable at the Bullhead, Aldgate," and afterward indorsed to the plaintiff for value, who took it *bona fide*, and without knowledge of the alteration, it was held that this was a material alteration, which discharged the acceptor. In the case of *Oakey v. Wilcox*, 8 How. 380, it was held that if, after a note has been delivered to the payee, a particular place of payment be inserted therein by interlineation, without the maker's consent, he will be discharged. In the case of *Narro & Green v. Fuller & Patterson*, 24 Wend. 374, it was held that an alteration of a promissory note by the payee thereof, so as to make it purport to be payable at a particular place, vitiates it in the hands of an indorser, so that he cannot recover upon it in an action against the maker.

It is manifest from the facts proved in this case, that the promissory note executed by Morehead was changed, by the insertion of the words inserted, so as to make it a negotiable note, without his knowledge or consent, either express or implied. That it is a material alteration is abundantly shown by the authority of the foregoing cases. This court should, therefore, reverse the judgment of the court below, with costs to the appellant, and should enter here the judgment which the court below should have rendered, which is that judgment be for the defendant.

Judgment reversed.

OSBURN V. STALEY.

(5 W. Va. 65.)

Statute — perjury evidence to impeach. Constitutional law.

The constitution of West Virginia requires each branch of the legislature to keep a journal, and provides that on the passage of every bill the vote shall be taken by yeas and nays, and be entered on the journal, and no bill shall be passed by either branch without an affirmative vote of a majority of the members elected thereto. *Held*, that on a question touching the validity of an act, the court can look beyond the authentication of the act, to the journal of either branch, to see if the bill passed by the required number of votes,

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The constitution of the State provides that "no bill shall be passed by either branch of the legislature without an affirmative vote of a majority of the *members elected* thereto." An act was passed by the affirmative vote of eleven senators, in a body which consisted, when full, of twenty-two members; one member having resigned after the opening of the session at which the act was passed. *Held*, that the court would not declare the act unconstitutional. (*See note, p. 648.*)

BILL for an injunction. The opinion states the case.

Hunter & Travers, for appellants.

Faulkner & Van Swearingen, for appellees.

MAXWELL, J. By the second section of an act purporting to be passed by the legislature of this State, on the 23d day of February, 1871, entitled "An act to change the county seat of Jefferson to Charlestown, in said county," it is provided, "That the county seat of the said county of Jefferson shall cease to be at Shepherdstown, in said county, thirty days from and after the passage of this act, and from and after that date be located at Charlestown, in said county." The third section of the said act provides that Logan Osburn, James H. Moore, John E. Cockerell, David Howell, Sr., and John J. Lock be appointed commissioners to carry out the purposes of the act, by causing the public records to be removed from Shepherdstown to Charlestown, and by causing to be procured at Charlestown, rooms suitable to contain the records and to be used as offices by the county officers. The said commissioners were required to do certain other things not necessary to be mentioned. When the said commissioners were about to proceed to carry into effect the provisions of the act, John D. Staley and others, the appellees here, citizens, tax payers and residents of Jefferson county, applied to the judge of the fifth judicial circuit for an injunction to enjoin and restrain them from performing their supposed duty under the said act. The said judge refused to award the injunction, and application was then made to one of the judges of this court, who granted it, and the cause was sent to the circuit court of Jefferson county to be proceeded in. The defendants, upon being summoned, answered the bill and moved the judge of the circuit court of Jefferson county, in vacation, to dissolve the

injunction, which he refused to do, and it is from this order the case comes here on appeal to be reviewed.

The first cause of error assigned is, that the complainants are private persons, not acting in any official capacity, and therefore could not enjoin the defendants.

The bill, and amended bill, filed after the injunction was allowed, show that certain of the parties named have special interests to be affected by the removal of the county seat, and also show that the bill is filed in behalf of the complainants and others in the county of Jefferson having like interests, which is sufficient to allow them to maintain the suit. Story's Equity Pl., § 114; *Lusher v. Scites*, 4 W. Va. 11; *Kuhn v. The Board of Education of Wellsburg*, id. 490.

The second cause assigned as error is, that the injunction was improperly allowed by a judge of this court, because it is claimed that the person who indorsed the refusal of the injunction as judge of the fifth circuit, was not at the time a judge of the said circuit.

It is well known that the person who indorsed his refusal to allow the injunction was at that time, and still is, the acting judge of the fifth circuit, and the 15th section of chapter 7 of the Code, page 73, provides that all acts done by any person by authority of any office shall be valid, and such would indeed be the law without this act of the legislature.

The third ground of error assigned is, that "the court cannot, for the purpose of impeaching a statute, go behind the record to inquire into the regularity of the proceedings of the legislature in passing such act. The enrolled bill, therefore, authenticated according to the form prescribed by law, is the ultimate and conclusive proof of the legislative will. The journals of the legislative houses are not competent evidence to show that a copy of a statute authenticated in the manner above stated, does not contain the whole law as in point of fact it was enacted. The validity of such a statute cannot be impeached or contradicted by the journals of the legislature."

The proposition intended to be propounded by this formula is, that this court cannot go behind the bill as enrolled by the clerk of the house of delegates, and signed by the president of the senate and speaker of the house of delegates, to look at the journal of the senate to see if the bill was passed by the number of votes required by the constitution. The constitution, article IV, section 37, provides

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that: "On the passage of every bill, the vote shall be taken by yeas and nays, and be entered on the journal; and no bill shall be passed by either branch without an affirmative vote of a majority of the members elected thereto." Section 39 provides: "Each branch shall keep a journal of its proceedings, and cause the same to be published from time to time." What is the evidence of the existence of a statute, to which the courts most look, is a question which has been often before the courts, and very much discussed. The oldest case before us at this time is that of *The King v. Arundel*, reported in Hobart, page 109. The first point in this case was to get rid of an act of parliament which had the "king's assent unto it," and "whereunto the great seal is set as the course is in private acts," because it was not the act of both houses, the lords and commons, as it ought to be. The court examined the journals, and could not find that the bill as amended, and to which the great seal was attached, had been passed by both houses, and proceeded to state: "But now supposing that the journal were every way full and perfect, yet it hath no power to satisfy, destroy or weaken the act, which being a high record must be tried only by itself *teste me ipso*. Now, journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity, neither have they always been. They are like the dockets of the pronotaries, or the particular to the king's patents." And so it was held that the courts could not go behind the authentication of the act, and it is believed that this case has ruled the English courts from that time to the present. The rule established in England has been followed by the courts of last resort in several of the United States, as will appear from the following cases: *Eld v. Gorham*, 20 Conn. 8; *Green v. Weller*, 32 Miss. 650; *Duncombe v. Prindle*, 12 Iowa, 1; *The State v. Young*, 32 N. J. Law, 29; *Speer v. Plank Road Co.*, 22 Penn. St. 376; *Evans v. Browne*, 30 Ind. 514. But in none of these cases does it appear that the constitution of the State in which they are decided requires the vote on the passage of a bill to be taken by yeas and nays, and entered on the journal, and requiring a certain number of votes to pass a bill. In the case of *Purdy v. The People*, 4 Hill, 348, it was decided by the court of errors of New York that the journals kept by the two houses of the legislature may be resorted to in ascertaining whether an act was passed by a vote of two-thirds. It was decided by the Supreme Court of Michigan, in the case of *The People v. Mahoney*, 13 Mich. 481, that

as the courts are bound judicially to take notice of what the law is, it is their right, as well as duty, to take notice not only of the printed statute books, but also of the journals of the two houses, to enable them to determine whether all the constitutional requisites to the validity of a statute have been complied with. The same doctrine is held by the justices of the Supreme Court of New Hampshire, reported in 35 New Hampshire, 579. The case of *Spangler v. Jacoby*, 14 Ill. 297, is more nearly in point than any of the cases found. The constitution of Illinois provides that: "Each house shall keep a journal of its proceedings." "On the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house." The court says: "A majority of all the members elected to either branch of the general assembly must concur in the final passage of a bill; this is indispensable to its becoming a law; without it, the act has no more force than the paper upon which it is written. The vote must be taken by ayes and noes. The constitution prescribes this as the test by which to determine whether the requisite number or members vote in the affirmative. The vote must also be entered on the journal. The office of the journal is to record the proceedings of the house and authenticate and preserve the same. It must appear on the face of the journal, that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law, and cannot be dispensed with by the legislature."

This case was reviewed and affirmed in the case of *The People v. Starnes*, 35 Ill. 121. It was held by the Supreme Court of California, in the case of *Fowler v. Pierce*, 2 Cal. 165, that the court may go behind the record evidence of a statute and inquire whether it was passed or approved in accordance with the constitution. The court say: "We are called upon to decide whether the courts of the land, to whom belong the guardianship and exposition of the laws and constitution, have power to go behind the act itself to inquire whether the legislature, or the executive, as a component part of the legislative power, have, in passing or approving such act, violated or disregarded the mode pointed out by the organic law of the land. * * * If such matters cannot be inquired into, the wholesome restrictions which the constitution imposes on legislative and executive action become a dead letter, and courts would

be compelled to administer laws made in violation of public rights, without power to interpose." The Supreme Court of the United States had this question in the case of *Gardner v. Collector*, 6 Wall. 499, and the following language is from the opinion of the court in that case: "How can it be held that judges, upon whom is imposed the burden of deciding what a legislative body has done, when it is in dispute, are debtors to resorting to the written record which that body makes in its proceedings, in regard to any particular statute. * * * In his opinion, therefore, on principle as well as authority, that when a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise meaning of a statute, the judges who are called upon to decide it have resort to any source of information which in its nature is calculated to convey to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." Cooley, in his work on Constitutional Limitations, 185, states what he understands to be the law in this country as follows: "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take notice. If it should appear from these journals that an act of a legislature did not receive the requisite majority, or that in respect to some of its provisions the legislature did not follow any requirement of the constitution, that in any other respect the act was not constitutionally valid, the courts may act upon this evidence, and adjudge the act void. But whenever it is acting in the apparent performance of its legal functions, every reasonable presumption is to be made of the action of a legislative body; it will not be presumed, in any case, from the mere silence of the journal, that either house exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution expressly required the journals to show the action taken in such instance, where it requires the yeas and nays to be entered, and to conclude from these authorities, together with others examined and not named here, that as the constitution requires each branch of the legislature to keep a journal, and provides that on the passage of every bill the vote shall be taken by yeas and nays, and that the yeas and nays be entered in the journal, and that no bill shall be passed by either branch without an affirmative vote of a majority of the members present."

elected thereto, this court should look beyond the authentication of the act to the journal of the senate to see if the bill was passed by the required number of votes. It was insisted in the argument of the case, that such a conclusion as this would be inconsistent with the case of *Lusher v. Scites*, decided by this court at a former term, and reported in 4 W. Va. 11. That case was in no respect like the present one. In the case of *Lusher v. Scites*, the passage of the acts by both branches of the legislature by the required number of votes was not questioned, and the only question was as to the effect of the acts in question when passed. It was held in that case that when an act is passed by both branches of the legislature by the number of votes required by the constitution, the courts cannot go behind the passage of the act for any purpose whatever, and that decision rests upon abundant authority, well known to every lawyer of intelligence who has examined the subject.

The fourth and last point made by the counsel for the appellant is, that only a majority of the members remaining after the resignation of one member is required to pass a bill. The senate, when full, consists of twenty-two members, and it is conceded that at the commencement of the session of the legislature, at which the bill in question was passed, this branch was full. The pleadings in the cause are indefinite and uncertain, but it sufficiently appears from the pleadings and the admissions of the parties, that at the time the vote was taken the journal will show that one member of the senate had resigned his seat, and that only eleven senators voted aye on the passage of the bill. The point of difference between the counsel is, the construction to be given to the provision of the constitution: "No bill shall be passed by either branch without an affirmative vote of a majority of the members elected thereto." Counsel for appellees contend that "members elected" mean persons elected as members at the last preceding elections, whether members at the time the vote is taken or not; while the counsel for the appellants contend that "members elected" means members who would be entitled to vote at the time the vote is taken on the passage of the bill, if present. It seems that when the vote was taken on the passage of the bill, the president of the senate ruled that eleven yeas were sufficient to pass it. An appeal was taken from this decision of the chair to the senate, and the chair sustained. The true theory of representative government is that a majority of the representatives of all the people to be bound by any

law, should assent to it, and it cannot be doubted but that the people, when they put this provision in the constitution, intended to secure themselves against the passage of any law to which a majority of all the people should not consent. The representatives of the people should be governed by the *spirit* of the constitution, and in doubtful cases should decline the exercise of power. For these reasons, with all respect, it was the duty of the senate to have declared the bill not passed. But the senate having declared the bill passed, this court is called upon to decide whether or not it can stand as a valid law. While the legislature is governed by the *spirit* of the constitution, the courts cannot declare an act of the legislature invalid unless its invalidity is placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained. The courts must be guided by the express words of the constitution, and not by its supposed spirit. Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give it force of law, such construction will be adopted by the courts. *Cooley's Const. Lim.*, pp. 182-185; *Cooper v. Telfair*, 4 Dal. 18; *Wellington, Petitioner*, 16 Pick. 95; *The People v. Fisher*, 24 Wend. 220; *Sears v. Cottrell*, 5 Mich. 251; *Tyler v. The People*, 8 id. 320; *City of Baltimore v. The State*, 15 Md. 376. In the light of these well-established rules, what is the meaning which should be given by the courts to the words, "members elected?" If they can be held to mean persons who are members at the time the vote is taken, then the bill was passed by a sufficient number of votes. The words appear to mean that a person must be a "member," as well as "elected;" and if a senator resigns his seat, and his resignation is accepted, is he still a "member?" It is certainly not clear beyond a reasonable doubt, that the words "members elected" can only refer to persons elected at the last preceding elections, although they may have ceased to be members at the time the vote is taken on the passage of the bill; and a reasonable doubt as to this is sufficient to sustain the validity of the act in question. And again, according to another rule of construction stated, that whenever an act of the legislature can be so construed as to avoid conflict with the constitution, and give it force of law, such construction will be adopted by the courts. The construction that "members elected" refers to those who were members at the time the vote was taken, should be adopted to sustain the validity

of the act. Upon the whole, no good cause appears to require the court to declare that the act is unconstitutional and invalid. The decree or order complained of will, therefore, have to be reversed, the injunction dissolved and the bill and amended bill dismissed.

MOORE, J., concurred in the conclusion of MAXWELL, J.

BREKSHIRE, P., dissented.

Injunction dissolved.

NOTE.—In *Mayor v. Harwood* (10 Md. 471), 3 Am. Rep. 161, evidence that an act had been changed by a mistake of the engrossing clerk was held not to be admissible, and in *Louisiana State Lottery v. Richards* (25 La. Ann. 743), 3 Am. Rep. 622, parol evidence was held to be inadmissible to show that the legislature had not complied with the constitution in passing a law which has been duly promulgated. See *Payne et al. v. Payne v. Commissioner*, ante, p. 351.

The judges of the Supreme Judicial Court of New Hampshire, in response to a resolution of the legislature, expressed its opinion that "When an act is found lodged in the office of the secretary of state, with other public acts passed at the same session, signed by the speaker of the house of representatives and the president of the senate and approved and signed by the governor, and published by authority as one of the public statutes, that constitutes *prima facie* evidence that said act received the assent of the two branches of the legislature and the approval of the governor, in the manner required by the constitution to make it a valid statute of this State, but that the journals of each branch of the legislature are to be considered and treated as authentic records of the proceedings, and that they may be resorted to in such cases to ascertain whether the two houses in fact concurred in the passage of any specified act; and that if it appears by the journal that they did not thus concur, the *prima facie* evidence derived from an examination of the act itself will be overcome, and the act will be held to be invalid, and of no effect as a law." The above is in the language of the judges as reported in 25 N. H. 422, and is in affirmance of the opinion of the same court in 25 N. H. 472.

The journal of each branch of a legislature is a public record of which courts are at liberty to take judicial notice, "and if," says Judge Cooley (Constitutional Law, 135), "it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may not upon this evidence, and adjudge the statute void." To this proposition the following cases are cited. *Spangler v. Jacoby*, 14 Ill. 297; *Miller v. State*, 3 Ohio St. 475; *People v. Mahoney*, 15 Mich. 421; *Southwick Bank v. Commonwealth*, 3 Penn. St. 445; *McCallist v. State*, 11 Ind. 439; *State v. Meigs*, 5 Ohio, 385; *Turley v. Logan Co.*, 17 Ill. 131; *People v. Supervisors of Champaign*, 3 N. Y. 517; *Jones v. Hutchinson*, 43 Ill. 721; *Fordyce v. Goodwin*, 20 Ohio St. 1; *Prescott v. Trustees of Ill. & Mich. Canal*, 19 Ill. 224.

When the copy of an act is incorrect, the court will be governed by the parliament roll. *See v. Jeffrie*, 1 Str. 445; *See v. Robotham*, 3 Burr. 1472.

On this subject Mr. Brewster says, (Stat. and Const. Law [2d ed.], 88): "It is settled that the judges may, and if they deem it necessary should, look beyond the printed statute book and examine the original engrossed bills on file in the office of the secretary of state, and it seems that the journals kept by the two houses may also be consulted." And he cites, *Payne v. People*, 4 Hill, 224; *DeBore v. People*, 1 Denio, 9; *Commercial Bank of Buffalo v. Spoor*, 3 id. 37. See also *People v. Deffen*, 20 N. Y. 229; *Beecher v. Jones*, 3 Penn. (Ill.) 429; *People v. Hatch*, 19 Ill. 226; *Hensoldt v. Petersburg*, 64 Ill. 187; *Green v. Green*, 1 Doug. 251. On the other hand it was held in *Sherman v. Story*, 20 Cal. 222, that the court would not go behind the statute as enrolled, if properly authenticated. See also *Swann v. Bank*, 49 Miss. 222; *Peete v. Fleming*, 10 Md. 222; *Swann v. Driscoll*, 20 Ind. 224.—*Rev.*

Shaffner and of Sarah Shaffner, defendant's first wife; that Susan lived in defendant's house before and after her marriage, and that she was unmarried when defendant's first wife died. There was evidence of declarations of defendant that the symptoms of John Sharlock and of his two wives at their death, were all different. The commonwealth then offered to show that the death of defendant's first wife September 4, 1869, and of John Sharlock February 17, 1871, were from poison, and that their symptoms were the same as those of Nancy, the second wife, who died June 11, 1871; and that defendant was the attendant of each, and that they died at his house. This was offered for the following purpose: 1. To negative what the prisoner said of the deaths being dissimilar, using it as an argument to meet allegations that Nancy died from poison taken by herself. 2. The bearing of the deaths and their causes on the question of motive. 3. To disprove any inference that Nancy died from poison by accident or suicide. 4. That the deaths were so connected that they form one chain of facts which cannot be ascertained without rendering part of the evidence received unintelligible, incomplete and imperfect. The evidence relating to the first wife's death was rejected; but that relating to the death of Sharlock was received.

The court charged the jury among other things that "In the present case, if the prisoner is guilty at all, there can be no difficulty in ascertaining the degree of guilt, for, being by poison, it must necessarily be murder of the first degree, if purposely administered. * * * If your mind and judgment are convinced beyond any reasonable doubt that he is guilty of the crime, it is a high and heinous one, is murder of the first degree, as declared by the act of assembly, and it is your duty to say so, without the slightest regard to the consequences to the prisoner."

The jury rendered a verdict of murder in the first degree. A new trial was denied and defendant was sentenced to be hanged. The case was then removed to the Supreme Court by defendant.

A. J. Herr and Hamilton Abricks, with whom was *R. A. Lambertson*, for plaintiff in error. Evidence of the commission of one crime is not admissible to prove another. *Commonwealth v. Ferrigan*, 8 Wright, 387; *Stone v. State*, 4 Humph. 27; *State v. Wisdom*, 8 Porter, 511; *Rex v. Ellis*, 2 Russell, 698; *Rex v. Birdseye*, 4 C. & P. 386; *United States v. Mitchell*, 2 Dal. 357; 1 Greenl. Ev., § 52,


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1 Phillips' Ev. 645, and note; 1 Chitty's Cr. Law, 564; Roscoe's Crim. Ev. 70. As to the charge of the court: *Lane v. Commonwealth*, 9 P. F. Smith, 371; *Rhodes v. Commonwealth*, 12 Wright, 396.

J. M. Wiestling, district attorney, and *W. Mac Veagh* with whom was *S. H. Alleman*, for the Commonwealth. The evidence connecting the Sharlocks with defendant was offered to show his motive. 2 Russell on Crimes, 774-779.

This is not affected by the fact that it proved another offense for which defendant might be indicted. Roscoe's Crim. Ev. 86; 1 Phillips on Ev. 767; 1 Whart. Crim. L., §§ 647-649; *Heath's Case*, 1 Harrison, 507; *Dunn v. State*, 2 Ark. Rep. 244; Roscoe's Crim. Ev. 93; *Reg v. Garner*, 4 Foster & Finlaison, 346.

AGNEW, J. It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt, on the ground, that having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged; it therefore predisposes the mind of the juror to believe the prisoner guilty. To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If



the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt.

We come now to the offer of evidence received by the court. Leaving out that part relating to the prisoner's first wife, which the court rejected as too remote, the offer was to prove that John Sharlock died from poison, the same kind of which Nancy, the prisoner's wife, died; that his symptoms were the same as hers; that the prisoner attended upon both, and that both died at the prisoner's house—Sharlock on the 17th of February, 1871, and Nancy, the wife, on the 11th of June, 1871. In substance, this was an offer to show that the prisoner poisoned Sharlock, as evidence that he also poisoned his own wife. The purpose insisted on, was to show a motive on the part of the prisoner for taking the life of his wife, and that the deaths were so connected that they formed one chain of facts, which could not be ascertained without rendering part of the evidence received unintelligible and incomplete. It is argued that the motive of the prisoner for taking the life of Nancy, his wife, was to enable him to obtain her money; and to enable him also to marry Susan, the wife of John Sharlock, who had been the prisoner's paramour, as the means of obtaining her money, which was in the form of an insurance policy, on the life of her husband, John Sharlock, and that in order to carry out this plan, it was necessary first to put Sharlock out of the way.

It is obvious that to connect together the deaths of Sharlock and Nancy, and make the former bear upon the latter, they must have been both contemplated by the prisoner as parts of one plan in his mind, in which the taking of Sharlock's life was a part of his purpose of taking the life of Nancy. He must, therefore, have contemplated the death of Nancy before taking the life of Sharlock. In order to let in the poisoning of Sharlock, the judge must have had before his mind some fact or facts exhibiting this pre-existing determination to take Nancy's life. Herein the evidence was defective. Let us examine the question of probable motive, and first as to the money of Nancy, his wife. Now, clearly it was not necessary to put Sharlock out of the way to obtain it. Sharlock's death opened no door to reach it. Nancy's death alone would bring it. The evidence was, therefore, inadmissible on this score.

Then there was the prisoner's illicit intercourse with Susan Sharlock. This made the turning-point of the admission of the evidence by the court. But there was no evidence that the prisoner at any time contemplated marriage with Susan, from which such an intent can fairly be inferred to have existed before Sharlock's death; yet this is the essential fact to make it probable that the prisoner took Sharlock's life, as preparatory to taking Nancy's life, and as the means of enabling him to marry Susan. According to the evidence, the libidinous intercourse between him and Susan existed for years, during the lives of both his wives, without restraint, and Susan continued in his family after his marriage with Nancy, and her own marriage with John Sharlock. Nor was desire of the enjoyment of Susan, so long sated at pleasure, curbed by any new impediment, to make it a ruling motive; while the evidence also shows, that after the prisoner's first wife's death, he purposely passed by Susan, when she was single, to marry Nancy, the second wife. Now that the meretricious intercourse with Susan having existed so long, and when he could have gotten her, having left her to marry Nancy, and the opportunity of enjoying her still continuing, it is not a reasonable or probable presumption that the idea of marrying Susan was in the prisoner's mind when he poisoned Sharlock, nearly four months before he poisoned his wife, so as to constitute a ruling motive to take the lives of both Sharlock and Nancy, as the means of marrying Susan.

Then we come to the pecuniary motive, viz., of obtaining Susan's money. If the prisoner had been on his trial for the murder of Sharlock, his desire to obtain the policy-money dependent on Sharlock's death would constitute a motive for taking his life; but the question here being upon the profitable motive for taking Nancy's life, the inquiry is, what probable connection existed in the design of the prisoner to make Sharlock's death preliminary to that of Nancy? Let it be supposed that the purpose of the prisoner in taking the life of Sharlock was, to enable him to obtain Susan's policy-money, yet it was not a necessary consequence that the prisoner deemed it essential to his plan that he should also take his own wife's life. It is evident these two purposes cannot be linked together, unless the prisoner considered his marriage with Susan necessary to obtain her money. Marriage with Susan must then have been a pre-existing intent, inducing him to frame in his mind the plan of taking the lives of both Sharlock and Nancy, to

enable him to marry Susan and thus to obtain her money. But here the evidence fails to furnish the wanting link. There was no evidence, as we have seen, of any design to marry Susan, while it also appears that the prisoner had no cause to doubt his power to obtain possession of Susan's money, in order to make marriage a ruling motive. On the contrary, the evidence shows that instantly on Sharlock's death the prisoner took the steps to obtain the policy-money, and soon accomplished the purpose. The agent of the insurance company states, that when the money was paid to Susan she handed it to the prisoner, who put it into his pocket; and we find that afterward he spoke of still having it, and offered to pay a debt for Susan. It might be, if the prisoner found that Susan would not part with her money after she got it, he then formed the design of marrying her to get it, and as the means of doing so then resolved to kill his wife. But this comes too late, for unless this purpose was present to his mind before he took Sharlock's life, it could not constitute a motive and part of his plan to take his wife's life also, so as to link the two deaths together. But in order to be present to his mind before Sharlock's life was taken, he must have previously known or believed, or must have plainly foreseen he could not avail himself of Susan's money without marrying her, and concluded to marry her, a fact unsupported by any evidence. The previous purpose to marry Susan is the broken link in the chain to complete the connection, without which the death of both are not so probably connected, as to make Sharlock's death evidence on the trial for the death of Nancy. It was therefore unjust to the prisoner to compel him, on his trial for the murder of his wife, to defend himself against the charge of murdering Sharlock. The offer should have been rejected.

The other errors assigned to the charge are not sustained. It is contended, and earnestly pressed upon us, that the judge had no right to say to the jury that if the prisoner was guilty of murder, it was murder in the first degree, and it was their duty to say so regardless of consequences. The indictment charged a murder by poison, and such was the tendency of the evidence. It was not only the right but the duty of the judge to inform the jury of the degree which the law attaches to murder by poison, and to instruct them in their duty under the law. It is only when the charge becomes imperative, and takes from the jury the right of deciding and pronouncing the degree of the murder, that we have held it

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to be error. When left free, as in this case they were, to decide the degree for themselves, we have not held it to be error to impress upon their minds the legal inference from the facts, and their duty to obey the law. But when, as in *Rhodes v. Commonwealth*, 12 Wright, 396, and *Lane v. Commonwealth*, 9 P. F. Smith, 371, a court addresses a jury authoritatively, and requires of them a verdict of murder in the first degree, it is error. Jurors uninstructed in their rights in a capital case may feel themselves constrained by the peremptory direction of the judge. Both the cases referred to stood upon the same ground, and in both the error was the binding instruction of the court. The language in this case approaches closely the boundary line of peremptoriness, but we cannot say it overstepped it, in view of those parts of the charge which left them free to act for themselves. Jurors are so apt to lean away from a verdict of murder in the first degree, we must not scan too critically the language of the judge, if he has left them free to find the degree of the murder, on the evidence. None of the other assignments of error require notice. The sentence of the court of oyer and terminer is reversed, and a *venire facias de novo* is awarded, and the record is ordered to be remitted for a new trial.

RUTHERFORD'S CASE.

(73 Penn. St. [30 P. F. Smith] 22.)

Constitutional law. Statute providing for the drainage of lands. Notice to land owner.

A statute of Pennsylvania provided that contiguous lands belonging to several owners disjunctly, which had once been drained but the drains on which were not kept open, should be redrained on the petition of any owner of the lands, and on the report of commissioners appointed by the court. No notice as to the appointment of the commissioners was required to be given to the owners of the land where the drains were located, and a penalty of \$10 per day was imposed upon such owners for neglecting to comply with the order directing the redrainage. *Held*, that the statute was unconstitutional; the proceeding provided being out of the due course of law.

PROCEEDINGS instituted under the act of May 9, 1871, entitled "An Act for redraining wet and swampy lands." The only ques-

tion involved in the case is the constitutionality of the act which is as follows:

Section 1. That any contiguous swampy or wet lands belonging to several owners disjointly, which have once been drained and the drain or drains are not properly opened and in good condition, shall be redrained under the following regulations:

Sec. 2. On the petition of an owner of such lands, the court of quarter sessions shall appoint three disinterested commissioners, with power to view the lands described in the petition, and if, in their judgment, to redrain them shall be practicable, they shall report to the court, setting forth the names of the owners through whose land the drain needs to be re-opened and attach a draft of the drains to be re-opened with their dimensions.

Sec. 3. On presenting the report, the court shall order a notice to be served by a constable on the land owners through whose land the drains need to be re-opened, ordering him to open the same through his land at his own expense, according to the draft attached to the commissioners' report, within a time to be fixed by the court, not exceeding sixty days.

Sec. 4. The constable, within ten days after the time set by the court, shall make return to the clerk of the court, of the service of the notice and the compliance or non-compliance with its order; and if he return that the order has not been complied with, a penalty of \$10 a day from the time of filing the constable's return, until the drain shall be re-opened, shall be imposed upon the non-complying owner, recoverable in the name of the Commonwealth, by the petitioning owners, when over \$50 shall become due, one-half to the person suing and the other half to the use of the directors of the poor.

Sec. 5. The costs of the proceeding to be borne by the party through whose land the drains may be so re-opened.

The court below held the law constitutional. The case was then removed into the Supreme Court by *certiorari*.

J. H. Weiss, L. W. Hall, and F. Jordan, for certiorari.

O. F. Johnson, contra. An act of assembly to be unconstitutional must bear upon its face a direct inconsistency with the letter of the constitution; *Sharpless v. Philadelphia*, 9 Harris, 147; *Monongahela Navigation v. Coons*, 6 W. & S. 100; *Phila. & Tren*

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ton Railroad Co., 6 Whart. 25; *Watson v. P. & C. Railroad Co.*, 1 Wright, 469. The State constitution must have a liberal construction, and whatever is not prohibited by it the legislature has jurisdiction of: *Commonwealth v. Hartman*, 5 Harris, 118; *Lewis & Nelson's Appeal*, 17 P. F. Smith, 153; *Commonwealth v. Maxwell*, 3 Casey, 444; *Philadelphia v. Field*, 8 P. F. Smith, 320.

AGNEW, J. The act of 9th May, 1871, P. L. 263, cannot be supported as a proper exercise of legislative power. It infringes the right of private property contrary to the true intent and meaning of the 9th article of the constitution. We have had occasion lately, to discuss the inviolable character of this right, in the case of *Washington Avenue*, 19 P. F. Smith, 352; 8 Am. Rep. 255, and will not repeat what was then said. It is not competent for the legislature to impose unjust, arbitrary and grossly unequal burdens upon individuals even for a public purpose; and it is less so, when the purpose is private and the proceeding not in due course of law, and highly penal, as in the present case. Before discussing the objectionable features of the act, it is proper to distinguish it in some respects, that we may not seem to decide more than the case before us. This act applies to contiguous swampy lands belonging to *several owners disjointly*, and that have been once drained. There is nothing in the law, or in this proceeding, to indicate that the owners of such adjoining lands are under a common duty to drain their lands, either by contract with each other, or by reason of a burden imposed, by a common predecessor in an entire title, under which all claim their several parts. We intend to express no opinion upon such a case, or to say that a remedy may not be provided for a specific performance of such a duty. In the opinion of the judge, it is said that the deeds, under which Mr. Henderson, the defendant, claims, require the drainage to be done. This, however, is not set forth in the petition or other part of the record, and if it had been, it does not appear that there is any privity in title or covenant, between William Rutherford and the defendant, which would entitle the former to enforce the duty against the latter, by action or otherwise. The presumption would be different, arising from the recital that he is the owner of the adjoining tract, *disjointly* from the defendant. There is, therefore, nothing in the act or case itself, except that these lands have been once drained;

but upon what terms or whether a continuing duty exists, it does not appear. The case therefore stands simply in the attitude that a law commands an owner of land, by a several and unconnected title, at his own expense, to drain his land, for the private and individual benefit of his neighbor, in the manner and to the extent that the commissioners shall direct, in a proceeding *ex parte*, and without notice to him, under a penalty of \$10 a day, for his omission to drain it, after notice of the *ex parte* determination of the viewers, and a certain time elapsed. Without a duty to redrain set forth and proved, clearly no law can compel a several owner of land disjointly from others, to re-open drains at his own expense for the benefit of others. This is an interference with private right not within the grant of legislative power. True, it may be greatly to his neighbor's advantage he should do this; and so it would be to keep an open way in good repair over his land, for his neighbor's benefit, and which his neighbor had been using, but without title. But men purchase land with their eyes open, and if it be swampy or hilly, or stony, or otherwise less valuable than their neighbors', they take it as it is, and cannot call upon their neighbors to help them to level it, or drain it, or pick the stone from it. Of course we do not refer to that police power of the State, which for the purpose of preserving the public health, or any other legitimate public necessity, enables the legislature to drain unhealthy swamps, or do other acts essential to public welfare. The whole proceeding under this act is not only out of the course of the common law, but is out of the due course of law. It imposes a burden without a duty, and without notice of the proceeding which imposes it; and for a refusal to bear it, it exacts a severe penalty without a previous trial. The law provides for the *ex parte* appointment of commissioners to view the land, determine whether it can be redrained, and report what drains shall be re-opened with their dimensions, and a draft of the same. Of this no notice is required to be given.

On the report of the commissioners, the court shall immediately order a written notice to be served requiring the party to open the drain or drains through his lands as required by the commissioners, at his own expense and within a given time, not to exceed sixty days; and on failure to comply, then to pay a penalty of \$10 a day, to be recovered in the name of the Commonwealth, before a justice of the peace, in sums of \$50, one-half for the use of the petitioner,

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and the other half to be paid into the county treasury for the use of the poor. Thus the first thing the land owner may know, he finds himself made liable to an imposition without trial or hearing, and subjected to a heavy penalty for not submitting to it. This is not due process of law. It is contrary to the Bill of Rights, and he is deprived of his money or its worth, without the judgment of his peers, and not according to the law of the land. It is true, the judge says in his opinion, that Mr. Henderson had actual notice of the proceeding. But no notice appears in the record, and such notice referred to is merely accidental. It is not judicial notice, or notice by virtue of any legal order. There may be cases where the omission of a law to provide for notice might be supplied by judicial action under the general powers of the court. But then the notice should be the act of the court, and should judicially appear in the record. But such was not this case. No authorities need to be cited for the general principles thus stated, and if any be sought for, the ample brief of the learned counsel of the plaintiff in error will supply all that may be required.

The judgment and order of the court of quarter sessions are reversed and set aside, and the proceedings are quashed at the costs of defendant in error.

ANGIER V. SCHIEFFELIN.

(72 Penn. St. [22 P. F. Smith] 106.)

Acknowledgment of mortgage. Parol evidence.

The acknowledgment of a mortgage of real estate was in the form: "E. County, ss.: Before the subscriber, a justice of the peace of said county etc." The justice was of C. county, the land was situated there, and the mortgage was recorded there. *Held*, (1) that the acknowledgment was properly on the record, and was a notice to subsequent purchasers; and (2) that parol evidence was admissible to show that the acknowledgment was taken in C. county.

SCIRE FACIAS issued by Schieffelin Brothers & Co., against George M. Mowbray and Jacob D. Angier, terre-tenant. The defense was by Angier. The plaintiffs offered in evidence a mortgage of \$2,900

from Mowbray to themselves, on real estate in Crawford county, dated May 2, 1862. The acknowledgment was as follows:

"ERIE COUNTY, ss.:

"Before the subscriber, a justice of the peace of said county, personally came George M. Mowbray, the mortgagor above named, and in due form acknowledged the above indenture to be his act and deed. In testimony whereof, I have hereunto set my hand and seal this third day of May, in the year of our Lord one thousand eight hundred and sixty-two.

[L. S.]

"E. H. CHASE."

The mortgage was recorded in the recorder's office of Crawford county, May 7, 1862, and Chase, the justice, was not of Erie county but of Crawford county. Evidence was admitted under objection to show that the acknowledgment was taken in Crawford county, and that "Erie" with the "ss" was a mistake. It appeared that Angier claimed the premises covered by the mortgage, under a sheriff's sale on a judgment against Mowbray in favor of one Watson, and a deed from Watson to Angier. This sale and conveyance took place in 1866, and Angier recovered possession by ejectment against Mowbray, April 22, 1870. The defendant Angier insisted that the mortgage was not entitled to record, that it was not a notice to subsequent purchasers, and that the evidence in regard to the circumstances under which the mortgage was acknowledged was not admissible. The court held that Angier took the land subject to the mortgage. Verdict for plaintiff for \$4,389.41. The case was removed to the Supreme Court by defendant Angier.

Douglass & McCoy, for plaintiff in error. Parol evidence was inadmissible to contradict the acknowledgment. *Watson v. Bailey*, 1 Binn. 470; *Jourdan v. Jourdan*, 9 S. & R. 268; *Selin v. Snyder*, 7 id. 166; *McPherson v. Cunliff*, 11 id. 422. The record of a deed defectively acknowledged is not a notice to a subsequent purchaser. *Simon v. Brown*, 3 Yeates, 186; *Goepp v. Gartiser*, 11 Casey, 130. *Heister v. Fortner*, 2 Binn. 40.

B. S. McAllister and *J. B. Brawley*, for defendants in error. The acknowledgment on its face was regular, and the recorder was

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bound to record it; it could not mislead one seeking for incumbrances. A blank for the county could have been supplied by parol. *Fuhrman v. Loudon*, 13 S. & R. 386; *Scott v. Gallagher*, 11 id. 347; *Bennet v. Paine*, 7 Watts, 334; *Pierce v. Hakes*, 11 Harris, 231.

THOMPSON, C. J. The learned judge of the common pleas was right in his reasoning and conclusions on the point raised by the defendant below and defendant in error, in regard to the question of notice furnished by the record of the plaintiff's mortgage. Had Chase been a justice of the peace of Erie county, the acknowledgment before him by the mortgagor, although the land lay in Crawford, or any other county in the State, would have been all right, and the duty of the recorder of Crawford county to enter it of record, when offered for that purpose, would have been undoubted. This being the appearance of things, it was properly put on record by the recorder, and was thence *prima facie* notice to terre-tenant of the incumbrance. Had he doubted the validity of the acknowledgment taken by Chase, he could have satisfied himself by examining the recorder's office that he was a justice of the peace, in and for Crawford county, for undoubtedly his commission was on record, as required by the act of 11th April, 1840, and that he was a proper officer to take the acknowledgment. This being followed by an inquiry of the magistrate would have fixed the fact that the mortgage was in truth properly acknowledged. Whatever is sufficient to put a party on inquiry, where it ought to result in the information, is equivalent to notice. This is a general rule. All this by very little industry the plaintiff in error could have had. With it, would the defendants have been concluded? He did not make the examination and inquiry, but the plaintiff offered to prove the facts and the court admitted the testimony. By this it appeared that Chase took the acknowledgment in his office in Titusville, Crawford county. It is very evident that the mortgage was filled up on an Erie county blank, and that the justice neglected to alter the name of the county referred to in the *scilicet*, from Erie to Crawford; hence the error. But in point of fact the mortgage was well acknowledged, as the testimony showed. Authorities abundantly establish that testimony to supply errors and omissions in acknowledgments and certificates of magistrates, quite as important as that under consideration, has always been received in this Commonwealth, and the

reason is given in *Rigler v. Cloud*, 2 Harris, 361, that "it is against the spirit and genius of our government to extend nice technical objections to the acts of magistrates and other functionaries of the law, who are called from the mass of the people to discharge duties without previous legal learning or experience." The first of these cases is *The Commissioners of Berks County v. Ross*, 3 Binn. 539, where proof *aliunde* the magistrate's certificate to a deposition which omitted to state his official character, was admitted to prove that fact. In *Fuhrman v. Loudon*, 13 S. & R. 386, no county was mentioned by the magistrate at all as his place of residence in the certificate of acknowledgment. But it was held that the words, "a justice of the peace, in and for said county," should be regarded as referable to the county in which the lands described in the deed lay, and in this way the acknowledgment was held good. So in *Scott v. Gallagher*, 11 S. & R. 347, an omission from the certificate of acknowledgment that the magistrate was a justice of the peace of the county in which the land was situated, was held not to vitiate the acknowledgment, and that it was proper to admit proof *aliunde* to establish that fact. The propriety of this ruling is fully sustained by GIBSON, C. J., in *Bennet v. Paine*, 7 Watts, 334. In *Pierce v. Hakes*, 11 Harris, 231, the objection was that the deed was defectively acknowledged before a court in the State of New York, because the certificate of the judge did not certify that the court in which the deed was acknowledged (being a deed to bar an entail), was a court of record, and that the omission was not cured by proof of the fact. In the opinion of this court, per LOWRIE, J., it was said: "It is admitted that such a certificate by a justice of the peace is good, though he omits to state his official character. It follows that it is the fact, and not the certificate of the given official character, that is required." This court, in the recent case of *Brookes' Appeal*, 14 P. F. Smith, 127, held that the clerical error made by the recorder on the margin of the record of a mortgage, of "January" instead of "February," might be corrected by the note made when the instrument was left for record. This is in the spirit of the case just cited. We do not mean to say that every omission in a certificate of acknowledgment may be supplied *aliunde*; it is only of those of the character we have been discussing and analogous cases, in which we think it may and ought to be done. It was proper in this case.

There is no error in this record, and the

Judgment is affirmed.

Scott v. Noble.

SCOTT, plaintiff in error, v. NOBLE.

(72 Penn. St. [22 P. F. Smith] 115.)

Jurisdiction — service of process on non-resident.

A joint action was brought in Massachusetts against A, a resident of that State, and B, a resident of Pennsylvania. Process was served on A and the court ordered that the plaintiff give notice to B by service of a copy of the order. B in Pennsylvania indorsed the order, "I accept service of this writ." A judgment by default was obtained against both defendants, and the plaintiff sued B in Pennsylvania, on the judgment. *Held*, that the Massachusetts court obtained no jurisdiction over B, and that the judgment against him was invalid.

ACTION on a judgment by Martin B. Scott against Theodore Noble. The opinion states the facts. The verdict was in favor of the defendant. The case was then removed to the Supreme Court by plaintiff.

D. W. Bell, for plaintiff in error. The exemption of a defendant from the service of a writ out of the jurisdiction of the court is a privilege which he may waive. 1 Tr. & H. 152; *Toland v. Sprague*, 12 Pet. 300; *Gracie v. Palmer*, 8 Wheat. 605; *Flanders v. Aetna Ins. Co.*, 3 Mason, 158. Consent may give jurisdiction of parties. *Walker v. Rogers*, 1 Wis. 597; *Gilliland v. Sellers*, 2 Ohio (N. S.), 223.

H. Burgwin, for defendant in error. The defendant or his estate must be within the jurisdiction of the court. *Lawrence v. Smith*, 5 Mass. 362; *Tappan v. Bruen*, id. 193; *Nye v. Liscomb*, 21 Pick. 263. A sovereignty cannot extend its process beyond its territory. Story's Confl. Laws, 14, § 539; *Steel v. Smith*, 7 W. & S. 447; *Rogers v. Burns*, 3 Casey, 525; *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. 232. Serving notice without State limits does not give jurisdiction. *Price v. Hickok*, 39 Vt. 292; *Woodward v. Tremmer*, 6 Pick. 354. The acceptance of service had no more effect than actual service would have had. *Arnold v. Frastellot*, 13 Pick. 172. Nullities having never possessed any validity cannot be cured. *Carlisle v. Weston*, 21 Pick. 535; *Vanderpoel v. Wright*, 1 Cow. 269; *Francis v. Sitts*, 2 Hill. 262.

READ, J. This case was rightly decided by the learned judge in the court below. Joseph Graftan and Theodore Noble, copartners, under the name of Graftan & Noble, of Cleveland, Ohio, gave their promissory note to Martin B. Scott, of the same place, dated November 18, 1842, payable one day after date. On this note Martin B. Scott commenced suit in the court of common pleas in Boston, Massachusetts. The writ was directed to the sheriff, who was commanded to attach goods or estate of defendants, and for want thereof to take the bodies of said Graftan and Noble, and have them before the justices of the said court. The sheriff returned that he had attached a chip as the property of Graftan, and left a summons for him at his last and usual place of abode in Boston, to appear in court, and September 17, 1844, he returned that Theodore Noble was not a resident of his precinct, and had no known agent, and could not be served. Upon the affidavit of Graftan, this action was removed to the Supreme Judicial Court at Boston. Graftan appeared, and in March term, 1845, on motion of the plaintiff Scott, it appearing by inspection of the record, that defendant Noble was not an inhabitant of the commonwealth nor resident therein at the time of the service of the writ, and had no place of abode or agent therein, and that no personal service of the writ has been made upon him, the court ordered the plaintiff to give notice to defendant Noble of the pendency of the action, by serving him with a true and attested copy of the order that he might appear and show cause why judgment should not be rendered against him in this action. On an attested copy appears this indorsement: "I accept service of the within writ, Theodore Noble," he then living in Pennsylvania.

On the 12th May, 1846, judgment was entered against Joseph Graftan and Theodore Noble, in default of an appearance, for \$6,363.26 damages and costs of suit, etc. The present suit is upon this judgment.

It was a valid judgment against Graftan, but not against Noble, who was not a citizen or inhabitant of Massachusetts; had no estate or property therein, nor was at any time before or during the pendency of the suit within the State.

In *Reel v. Elder*, 12 P. F. Smith, 315; S. C., 1 Am. Rep. 417, my brother Sharswood says: "Nor did the evidence given of the notice of the pendency of the proceeding, admitting that it was served on the plaintiff, make any difference; for in the language

Bradstreet v. Everson.

of the opinion (by Justice AGNEW) in *Colvin v. Reed*, 5 P. F. Smith, 375, 'back of it lies the want of power of the distant State to subject her to its jurisdiction'—clearly when it is once determined that a court has no jurisdiction. Notice, or even process duly served, cannot give vitality to the judgment it may pronounce. It is null and void, at least as to any extra-territorial effect." In addition to the authorities cited by the learned judge in the court below, Judge FLETCHER said in *Phelps v. Brewer*, 9 Cush. 395: "It is a matter too well settled to admit of discussion, that when a party is not within the jurisdiction, and is not served with process, and does not voluntarily appear to answer to the suit, by himself or his attorney, the judgment cannot be enforced against him out of the local jurisdiction. This point has been fully and repeatedly decided by this court, and since the institution of this suit has been directly adjudged by the Supreme Court of the United States." In *Bischoff v. Wethered*, 9 Wall. 312, in a count on a judgment in the court of common pleas at Westminster Hall, in England, the evidence was an exemplified copy of a judgment recovered against the defendant in the said common pleas, without any service of process on him, or any notice of the suit, other than a personal notice served in the city of Baltimore, Mr. Justice BRADLEY said, "as to the first point raised, to wit, the effect of the proceeding in the common pleas, Westminster Hall, it is enough to say that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against the property of the defendant there situate, it can have no validity here even of a *prima facie* character. It is simply null."

Judgment affirmed.

BRADSTREET, plaintiff in error, v. EVERSON.]

(72 Penn. St. [23 P. F. Smith] 124.)

Agency — liability of collecting agent.

Defendants who carried on a "mercantile agency," received from plaintiffs drafts and gave a receipt purporting to be a receipt of the drafts "for collection." They transmitted the drafts to their agent at the place where they were payable. The agent collected them, but failed to pay over the proceeds. *Held*, that defendants were liable.

ACTION brought by W. H. Everson, Barclay Preston and C. L. Grant, constituting the firm of Everson, Preston & Co., against Henry Bradstreet, C. H. Ranney, M. Hoffman and L. B. Reese, constituting the firm of J. M. Bradstreet & Son. Plaintiffs alleged that defendants were carrying on a mercantile agency in Pittsburg, and that they undertook to collect for plaintiffs four drafts, amounting to \$1,726.37, drawn on W. C. Bradford, of Memphis, Tennessee. The defendants gave plaintiffs the following receipt:

"J. M. BRADSTREET & SON, IMPROVED MERCANTILE AGENCY,
"PITTSBURG, June 2d, 1865.

"Received from Messrs. Everson, Preston & Co., four duplicate acceptances for collection, against Watt O. Bradford, Memphis, Tennessee, amounting in all to \$1,726.37.

"J. M. BRADSTREET & SON."

Defendants sent their drafts to J. W. Wood, their agent in Memphis, who collected the money and failed to pay over the proceeds. The remaining facts appear in the opinion. The plaintiffs obtained a verdict. The case was then removed to this court by defendants.

M. A. Woodward, for plaintiffs in error. The implied authority of agency is proved not from its general style but from the usages of a particular business or of a particular class of agents. Story on Agency, 96, 98; *Moore v. Patterson*, 4 Casey, 505. Before admissions of an agent could be given in evidence the agency must be proved. *Hays v. Lynn*, 7 Watts, 524. An implied agency cannot be extended beyond the obvious purposes for which it was created. Story on Agency, § 87. Custom, to be good, must be certain, uniform, reasonable, and sufficiently ancient to be generally known. *Collins v. Hope*, 3 W. C. C. R. 149; *Newbold v. Wright*, 4 Rawle, 195. The ratification of an act of an agent, in order to bind the principal, must be with a full knowledge of all the material facts. *Phil., Wil. & Balt. R. R. Co. v. Cowell*, 4 Casey, 329; *Owings v. Hull*, 9 Pet. 607; *Hays v. Stone*, 7 Hill, 128; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198. An agent exercising the usual diligence will not be responsible for loss from fraud or insolvency of persons whom he has trusted. Story on Agency, § 202. And the loss must be actual, not merely probable. Story on Agency, § 222.

M. W. Acheson, for defendants in error. Actual authority may be inferred from acts and circumstances, in the absence of direct

proof. *Dougherty v. Hunter*, 4 P. F. Smith, 380; *Allegheny City v. McClurkan*, 2 Harris, 81; *Sterling v. M. & S. Trading Co.*, 11 S. & R. 179; 2 Kent,* 613; *Piatt v. Olliver*, 2 McLean, 268; *Wright v. Burbank*, 14 P. F. Smith, 247. Where one undertakes to collect money he is responsible for the acts of the agent he employs. *Wingate v. Mechanics' Bank*, 10 Barr, 104; *Montgomery County Bank v. Albany Bank*, 8 Barb. 396.

AGNEW, J. There are but two questions in this cause which are required to be noticed. First, whether J. M. Bradstreet & Son authorized the receipt of June 2, 1865, by which they undertook to collect the claims mentioned in it, and, second, the nature of their liability. It is undisputed that J. M. Bradstreet & Son had a branch office in Pittsburgh, of what they termed their "improved mercantile agency," and that the persons employed in this office were their agents. They only deny that their business was a collecting agency, asserting that it was confined to giving to subscribers information of the mercantile standing of men in business in the different parts of the country. It is in testimony that the acceptances mentioned in the receipts were delivered, as the witness states, to J. M. Bradstreet & Son at the office of the agency, and the receipt given for them is in the name of J. M. Bradstreet & Son, and was made out by a person in the office, acting in their business. This was in 1865. In 1867 the plaintiffs were called on by a person belonging to the office for a power of attorney to be sent to their agent or attorney in Memphis, Tennessee, to enable them to collect the moneys for the acceptances from John W. Wood, the attorney to whom the acceptances had been sent by them, and who having collected the money had failed to pay it over to the defendants. This power, directed to J. B. Woodward, of Memphis, and dated August 30, 1867, was handed to the person in charge of the Pittsburgh office, who gave for it a receipt of the same date in the name of the defendants, stating that the power was executed by the plaintiffs at the request of the defendants, and addressed to *their* agent, J. B. Woodward. Woodward himself testifies that he was called on in Memphis by J. De Soto, the agent of J. M. Bradstreet & Son in that city, and at his request and in his company went to John W. Wood and demanded of him the money he had collected on the acceptances. He also testifies that his correspondence was with J. M. Bradstreet & Son, and not with the

plaintiffs, and that he was engaged to attend to the business by J. De Soto, the agent of the defendants at Memphis. There are some minor matters not necessary to be detailed. These facts were clearly sufficient to go to the jury upon the question whether the receipt was given by the defendants, and we see no error in the court below refusing to take the case from the jury.

The next question is upon the nature of the liability arising upon the receipt. It is in the following words: "J. M. Bradstreet & Son, improved mercantile agency. Pittsburgh, June 2, 1865. Received of Messrs. Everson, Preston & Co. four duplicate acceptances for collection, *versus* Watt C. Bradford, Memphis, Tennessee, amounting in all to \$1,726.37." (Signed) "J. M. Bradstreet & Son."

It is argued, notwithstanding the express receipt "for collection," that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reason for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason therefore to hold, that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt. An example of this limited liability is found in the case of *Bullitt v. Baird*, decided at Philadelphia in 1870, the only case in this State upon the subject of such agencies. There the receipt read, "For collection according to our direction, and proceeds, when received by us, to be paid over to King & Baird." Across the face of the receipt was printed these words

"N. B. The owner of the within mentioned taking all the risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war." The limitation of the liability of Bullitt & Fairthorn, by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction.

Recurring to the analogy of attorneys at law, the first point to be considered is the interpretation given by the courts to the terms of a receipt "for collection." In our own State we have several decisions in point. In *Riddle v. Hoffman's Ex'r*, 3 Penn. 224, Riddle, an attorney in Franklin county, gave a receipt in these words: "Lodged in my hands a judgment-bill granted by Henry H. Morwitz to Henry Hoffman for the sum of \$1,200, due with interest since the 15th of May, 1811, which is entered up in Bedford county, which I am to have recovered if it can be accomplished." Riddle sent this bill to his brother, a practicing lawyer in Bedford. The money was made by the sheriff, but by the neglect of the Bedford Riddle was not received from the sheriff, who became insolvent, and the money was thus lost. Hoffman sued the Franklin county Riddle on his receipt and recovered. On a writ of error it was contended that the words of the receipt, "which I am to have recovered if it can be accomplished," imported only a limited undertaking to have it collected by another, and not to collect it himself. But this court held that the receipt contained an express and positive undertaking for the collection of the money, if practicable, and not merely for the employment of another to that end; and that the defendant was bound by every principle of moral and legal obligation to make good the collection of the judgment by the application of reasonable diligence, skill and attention.

The next case is *Cox v. Livingston*, 2 W. & S. 103. This was the receipt: "Received of Mr. Thos. Cox, of Lancaster, Pa., for collection, a note drawn in his favor by Mr. Dubbs, calling for \$497.65, payable three months after date. The note was left with an instruction to bring suit. The receipt was dated August 30, 1837, and Livingston died in January following without having brought suit. Dubbs became insolvent. It was held that Livingston was liable for the collection, though only two terms intervened between the receipt and his death.

Krause v. Dorrance, 10 Barr, 462, was assumpsit against two attorneys for money collected and not paid by another attorney to

whom they sent the note for collection. The liability of the original attorneys for the collection was admitted, but the point was made and succeeded, that a demand before suit was necessary. ROGERS, J., says expressly they were liable for the acts of the agent whom they employed, but being without fault themselves, a demand was necessary before a resort to an action.

In *Rhines v. Evans*, 16 P. F. Smith, 192; S. C., 5 Am. Rep. 365, the receipt was: "Received for collection of A. Rhines one note on Lukens & Beeson, of Rochester, dated October 30th, 1857, for \$365." The liability of Evans, the attorney, was conceded, and the question was on the statute of limitations, and it was held the action was barred by the lapse of seven years and five months from the date of the receipt.

These cases show the understanding of the bench and bar of this State upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible. He is therefore liable by the very terms of his receipt for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client. There is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt, when he knows he must employ another to make the collection. *Bullitt v. Baird*, *supra*.

We find cases in other States holding the same doctrine. In *Lewis & Wallace v. Peck & Clark*, 10 Ala. 142, both firms were attorneys. The defendants gave their receipt to the plaintiffs for certain notes for collection, and after collecting the money, transmitted it to the payees in the notes instead of the attorneys who had employed them, the payees having, however, indorsed the notes. Held, that Peck & Clark were liable to their immediate principals, the plaintiffs, there being no evidence that the payees had given them notice not to pay over to Lewis & Wallace, the original attorneys. This is a direct recognition of the liability of the collecting attorney to the transmitting attorney. The case of *Pollard v. Rowland*, 2 Blackf. (Ind.) 22, is more directly in point. Rowland received from Pollard claims for collection, and sent them to Stephen, an attorney in another county. Stephen obtained judgment, and collected the money. Held, that Rowland was accountable to Pollard for the acts of Stephen to the same

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extent that Stephen was, and could make no defense that Stephen could not; and that Rowland was liable to Pollard for the money. *Cummins v. McLain et al.*, 2 Pike (Ark.), 402, was a case nearly similar to the Pennsylvania case of *Krouse v. Dorrance*, *supra*. The attorney sent the claim to another attorney at a distance, and was held liable, but for the omission of the plaintiff to make a demand, he failed to recover. The court say the attorney is liable for the acts of the attorney he employs. In a Mississippi case, two attorneys, Wilkison and Willison, received of plaintiff a claim for collection, and brought suit and obtained judgment. They dissolved partnership, Wilkison retiring from the practice; and Willison took another partner, Jennings, who received the money from the sheriff. In a suit against Wilkison as surviving partner of Willison, he was held liable for the receipt of the money by Jennings. *Wilkison v. Griswold*, 12 Smedes & Marsh. 669.

In view of these reasons and authorities, we hold that a collecting agency, such as the defendants have been found to be, receiving and remitting a claim to their own attorney, who collects the money and fails to pay it over, is liable for his neglect.

Judgment affirmed.

FOLLANSBEE, plaintiff in error, v. WALKER.

(72 Penn. St. [22 P. F. Smith] 228.)

Witness — when attorney may be.

An attorney who has opened a case and examined witnesses is a competent witness for his client.

ACTION of assumpsit brought by John W. Walker against H. N. Armstrong and Joshua Follansbee, constituting the firm of H. N. Armstrong & Co. The principal question in the case was as to the competency of the attorney for defendant, as a witness in behalf of his client. This question is stated in the opinion. The plaintiff obtained a verdict and defendant brought error to this court.

W. Benson, with whom were *A. J. Foster* and *E. Babbitt*, for plaintiff in error.

J. C. Marshall, with whom was *F. F. Marshall*, for defendant in error.

READ, C. J. On the trial of this case *A. S. Foster, Esq.*, was offered as a witness on the part of the defense, objected to by the plaintiff's counsel, and rejected by the court for the following reason: "Mr. Foster is attorney for the defendant Follansbee, opened the case for him to the jury and examined the witnesses for said defendant, and the court on this ground excludes him as a witness." This is assigned for error.

In *Frear v. Drinker*, 8 Barr, 521, Mr. Justice ROGERS says: "It is also contended an attorney is not a competent witness for his client. In England it has been lately ruled that an attorney is not to give evidence under certain circumstances." He cites two cases before Mr. Justice PATTESON and Mr. Justice ERLE, and he says, "The furthest the court has yet gone is to discourage the practice of acting in the double capacity of attorney and witness, but there is nothing to prohibit an attorney from being a witness for his client when he does not address the jury."

"It is said, and I agree, that it is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witnesses. It is a practice which, as far as possible, should be discountenanced by courts and counsel. But these cases are not open to this objection, because it appears negatively, that the counsel did not address the jury. It is sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client." In the earlier cases in Pennsylvania, the objection to the examination of the attorney in the cause was his interest in it, as in the case of the late Judge BALDWIN in *Miles v. O'Hara*, 1 S. & R. 32, in 1814. In the first case, *Newman v. Bradley*, 1 Dal. 240, in the year 1788, Howell, who was of counsel for the plaintiff, gave the chief evidence to support the action, and he and Tod argued the cause before the jury, and there was a verdict for the plaintiff. "When Howell offered himself as a witness, Levy objected that he was interested, inasmuch as his judgment fee depended on his success in the cause. But the objection was overruled by the court."

The two English cases cited by Judge ROGERS have since been overruled. Pitt Taylor in the 2d volume of his *Treatise on the Law of Evidence*, p. 1170, § 1240, 4th edition, thus states the

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law: "The judges at Nisi Prius were at one time inclined to regard as *incompetent to testify* all persons, whether counsel, attorneys or parties, who being engaged in a cause had actually addressed the jury on behalf of that side on which they were afterward called upon to give evidence. Further investigation of the subject, however, has led to a judicial acknowledgment that no such practice exists." The authority for this, *Cobbett v. Hudson*, 22 L. J. Q. B. 11, 1852, the judgment of the court (of which Mr. Justice ERLE was one) being delivered by Lord CAMPBELL, C. J.

The question may therefore be considered as settled in England and Pennsylvania, and also in Massachusetts: *Potter v. Inhabitants of Ware*, 1 Cush. 519. There was therefore error in holding Mr. Foster was not a competent witness.

The paper-books on both sides speak of testimony, and argued upon it, without printing the evidence on which the remarks are based, which obliges us to disregard what might otherwise be of importance.

The answer of the court to the third point appears to be open to the technical objection that the plaintiff could not recover in his own name, but must use the name of the firm of Walker & Armstrong.

Judgment reversed, and venire de novo awarded.

CHARTIERS AND ROBINSON TURNPIKE COMPANY, plaintiff in error,
v. McNAMARA.

(73 Penn. St. [23 P. F. Smith] 273.)

Evidence — unstamped instrument.

A written agreement made in April, 1868, but not stamped according to Act of Congress, is not admissible in evidence in a State court. (*See note, p. 680.*)

ACTION brought by Bridget McNamara against the Chartiers and Robinson Turnpike Road Company, to recover for work done by plaintiff for defendants. During the trial the defendants offered in evidence a written agreement dated April 24, 1868, to show a "specific contract to do the work for a specific sum," etc. The

agreement was excluded because it was not stamped, as required by act of congress. Plaintiff obtained a verdict and defendants brought error.

L. K. Duff and *G. Shiras, Jr.*, for plaintiffs in error, cited *McGovern v. Hoesback*, 3 P. F. Smith, 176; *Carpenter v. Snelling*, 97 Mass. 452; *Green v. Holway*, 101 id. 243; 3 Am. Rep. 339; *Sammons v. Holloway*, 21 Mich. 162; 4 Am. Rep. 465; *Lathurn v. Smith*, 45 Ill. 29; *Craig v. Dimmick*, 47 id. 308; *Bunker v. Green*, 48 id. 243; *Griffin v. Ranney*, 35 Conn. 239; *The People v. Gates*, 43 N. Y. 40; *Bumpass v. Taggart*, 26 Ark. 398; *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Daily v. Coper*, 23 Texas, 815.

S. A. McClung, for defendant in error, cited Acts of Congress of June 30th, 1864, and July 13th, 1866; *McCulloch v. Maryland*, 4 Wheat. 316; *United States v. Fisher*, 2 Cranch, 358; *License Tax Cases*, 5 Wall. 462; *Morris v. Morris*, 44 Miss. 441; *Corrie v. Billin*, 23 La. An. 250.

AGNEW, J. It appears in the bill of exceptions in this case, that the defendants offered in evidence a special written contract, dated April 24th, 1868, for the performance of the work done by the plaintiff. Objection to its reception in evidence was made "because the paper is not stamped as required by the act of congress." The paper being unstamped, the court rejected the evidence. The single question is, whether the act of congress justified the court in rejecting the paper as evidence. Under this bill, no question arises upon the validity of the written contract. Had the paper gone in evidence, that point could have been fairly open to discussion, under the 9th section of the act of congress of July 13th, 1866, amendatory of the 158th section of the act of June 30th, 1864, declaring a paper not stamped "with intent to evade the provisions of the act," invalid and of no effect. Laws of U. S., 1866, p. 303-4; id. 1864, p. 148. The inquiry under this bill is, therefore, confined to the amendment of the 163d section of the act of 1864, contained in the 9th section of the act of 1866 (p. 149), in these words: "That hereafter no deed, instrument, document, writing or paper required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof,

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shall be received or admitted, or used in evidence in any court, until a legal stamp or stamps, denoting the amount of the tax, shall have been affixed thereto as prescribed by law." This provision gives rise to two questions, the first upon the meaning of the enactment; the second, upon the power of congress to make it.

It has been held in Massachusetts and Michigan, that the provision applies only to the federal and not to the State courts. *Carpenter v. Snelling*, 97 Mass. 452; *Laugence v. Halloway*, 21 Mich. 162. It seems to us this interpretation of the act of congress was not well considered, and is contrary to the language and the design of the act. The words are, "or used in evidence in *any* court." Language could not be broader, and no exception or qualification is to be found in the act, while the design of congress makes the meaning perfectly clear. The paper is not to be admitted or used in evidence, "until a legal stamp, or stamps, denoting the amount of the tax, shall have been affixed thereto, as prescribed by law." Thus the purpose is plain to prevent the use of the unstamped paper, so long as it remains without payment of the tax or duty upon it. This is simply a disqualification of the instrument in the hands of the delinquent, to prevent its use, until he pays the tax. If "any court" mean only the federal courts, the design of congress is totally frustrated, as will be seen at once upon referring to schedule B, containing the subjects of the stamp tax, numbering over forty classes of "deeds, instruments, documents, writings, and papers," used in ordinary business. They will be found to comprehend all those numerous writings of every kind, which enter into the domestic affairs of the people, and the business of every-day life, in the very bosom of the State—a few for example: agreements, checks, orders, bills, bonds, certificates, deeds, mortgages, policies of insurance, leases, powers of attorney, protests, receipts, and legal documents. Now, for one such paper which can be sued upon in the federal court, by reason of ex-territorial citizenship or other ground of federal jurisdiction, nine hundred and ninety-nine others can never reach a federal court, and must be prosecuted in the courts of the State where they were made, and where the parties reside. This law is a revenue law, and of what use is the disqualification of the paper until the stamp duty is paid, as a means of enforcing payment, unless "any court" means State courts, as well as federal? Other portions of the section confirm this interpretation. The United States have no offices for the recording of

deeds, mortgages, powers of attorney and other documents, yet the paper is forbidden to be *recorded* till the proper stamp tax be paid. The word "recorded" cannot be separated from its immediate context, the words following it, viz.: "or admitted, or used, in evidence in any court," both run together, are part of the same sentence, and interpret each other. If "recorded" applies, as it must, to State offices of record, "any court" applies with equal force to State courts. Then, also, the words "until a legal stamp or stamps denoting the amount of tax shall have been affixed thereto, *prescribed by law*," refer to all the different kinds and amounts of stamps in schedule B, just as clearly as the words "deeds, instruments, documents, writings and papers," refer to their various kinds in that schedule, and thus bring us back a second time to the entire body of writings and papers in use among the people within the State.

How can it be said, in view of all these provisions, the subjects of the tax and the evident design of congress, that the words "any court," thus used in the broadest form and fullest sense, without qualification or exception, are to be limited to the federal courts, and thereby to defeat the enforcement of the payment of the tax, the only real purpose of the provision? When it is said, as in *Carpenter v. Snelling, supra*, that congress cannot pass laws regulating the competency of evidence in the trial of causes in the several States, the purpose of this provision is incorrectly stated. The abstract proposition is true, but it is misapplied. The purpose of congress was not to make rules of evidence, but to stamp the instrument of evidence, with a disqualification, which will prevent its use as evidence until the delinquent has paid his tax. If, then, in legislating upon proper subjects of federal power, so as to enforce the execution of the rightful power of congress, it be said congress can affix to the subject of the exercise of its clearly granted powers, qualities which must be recognized by State courts, I deny the assertion, and I oppose to it the second section of the sixth article of the federal constitution, which makes such a law the supreme law of the land, binding on the judges in every State. If in legislating on a proper subject of federal power, congress declare a forfeiture, for instance, of smuggled goods, with intent to evade payment of the duties on them, the State courts are clearly bound to recognize the title acquired by forfeiture in whosoever hands the goods may be. When the subject of a law is fairly within a

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federal power given in the constitution, congress has express power to pass all laws necessary and proper to carry the given power into execution. This is the test of the competency of this evidence. The instrument being a proper subject of the federal power to tax, it is just as clearly competent for congress to affix a disability to the unstamped paper that will compel the payment of the tax. The propriety, as well as the necessity, of the disability in this case, is so obvious, it does not admit of a serious question. The writing is a thing done between private persons, unseen by the eyes of revenue officers. Neither party has a motive to reveal it for taxation, for the tax enhances the price of an article of sale, and the expense of every pecuniary transaction evidenced by a writing. Neither is interested in inflicting the penalty upon the other. The very touch-stone of the value of the writing to the party who claims under it, is his ability to put it in evidence. It is just here the law touches the writing with its power, and makes it useless to the party until he performs his duty, by paying the tax upon it. What can be more proper, and, indeed, more just? He makes his contract under the law and subject to it. He knows, or is presumed to know, his duty, and should perform it. If he fail from real ignorance, or for reasons which show that he did not intend to defraud the revenue, the instrument is not invalid, and he has but to procure the writing to be stamped, and can then use it in evidence. Then on what principles of reason, or of sound constitutional law, can a State court, subordinate in this respect by the federal constitution, disregard the act of congress, and receive the disqualified paper in evidence, when the prohibition concerns the rights of the superior government, and is essential to its power to collect the tax? The taxing power being a clear federal grant of power, and the disqualification affixed to the writing as an instrument of evidence, being clearly proper to compel payment of the tax, the case falls directly under that provision of the federal constitution which makes the law supreme. "and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding."

We come next to the question of power, if, indeed, there can be any question in a matter so plain. But courts in other States have denied the power, and their decisions have been cited to us. I shall, therefore, state our views briefly. I heartily concede the doctrine of State rights in all those things wherein State rights

have been withheld from the federal government, and are by the constitution itself reserved to the States, or the people thereof. In all that concerns the personal happiness and freedom of the citizen, the State is his natural protector, and I would cling to her, therefore, in whatever belongs to her reserved and ungranted powers. I have said heretofore, that the doctrine of State rights, pushed to excess, culminated in civil war, while the rebound, caused by the success of the federal arms, threatens a consolidation equally serious; and, therefore, that the land-marks of the constitution, as planted by Chief-Justice MARSHALL and his associates, on the solid ground of reason, and a due regard to the rights of the States and of the Union, constitute the only safe guides of decision. *Craig v. Kline*, 15 P. F. Smith, 399. But when, as here, a clear case of federal power comes before us, the paramount duty we owe, as State judges, to the federal constitution, requires that we should uphold the exercise of the federal powers, as a matter of duty and conscience.

The power of congress "to lay and collect taxes, duties, imposts and excises," is the first great power conferred in the enumeration of powers found in the eighth section of the first article of the constitution of the United States, and immediately precedes, as its true purpose and end, the power "to pay the debts and provide for the common defense and general welfare of the United States." The 19th clause in the same enumeration, declares that congress shall have power "to make all the laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof."

At a very early day congress, under the taxing power, passed a stamp tax act, on the 6th of July, 1797, entitled "An Act laying duties on stamped vellum, parchment and paper." 1 U. S. Stat. at Large, p. 527. The 13th section contains this clause: "And no such deed, instrument or writing shall be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity, until it shall be stamped as aforesaid." Next came the act of 2d of August, 1813, entitled "An act laying duties on notes of banks, bankers, and certain companies; on notes, bonds, and obligations discounted by banks, bankers, and certain companies; and on bills of exchange of certain descriptions." 3 U. S. Stat. at Large, p. 77. The seventh section begins with this pro-

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vision: "That no instrument or writing whatsoever, charged by this act with the payment of a duty as aforesaid, shall be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity, unless the same shall be stamped or marked as aforesaid." This section contained a further provision, enabling the party, in cases of omission, to pay the stamp duty to the collector, and thereby to establish the efficacy of the instrument. Similar provisions are made in existing laws. Thus, it appears that the exercise of the power in question, in its most rigid form, is an old practice of the government, sanctioned by those contemporary with the formation of the constitution, and familiar with the relations between the States and the federal government. Added to this is the analogous legislation exercised from the first year of the organization of the government. Thus the act of July 31st, 1879, to regulate the collection of duties, in the 12th section, provides that goods, wares and merchandise, landed without the collector's permit, shall be forfeited, and may be seized by the officers of the customs; and if of the value of \$400, the vessel, tackle and furniture shall be subject to like forfeiture and seizure. 1 U. S. Stat. at Large, p. 29. The act of June 4th, 1794, for the collection of the internal revenue upon distilled spirits, stills, wines and teas, in the second section, provides for the forfeiture of the spirits distilled, and of the spirits itself. 1 U. S. Stat. at Large, p. 379. Then there are the numerous statutes relating to the coasting trade, tonnage duties, the embargo, etc., forfeiting both vessel and cargo; and various statutes on the subject of the internal revenue, forfeiting the subjects of taxation for non-payment of the taxes and excises; and decisions thereupon without number. See Brightly's Federal Digest, p. 127-8, 278, 487, 736, 803. This power to forfeit the subject of the tax, duty, impost, or excise, as a consequence of evasion or non-payment, is undeniable, for the reason that, being in the exercise of the express powers of the constitution, and the lawful means of carrying these powers into effect, they are within the clearly defined powers granted to the federal government. Now, it is perfectly obvious that the evidence of the title is not more sacred than the very thing itself. If the latter can be forfeited for delinquency, on what principle can it be affirmed that the former cannot be reached to compel payment? Certainly the paper evidencing the owner's right to money, or other property, is quite as much within the power of regulation to secure payment

as the thing itself is, of which it is the mere type. The argument which affirms that it cannot be so regulated places the incident on higher ground than its principal, and makes the shadow more sacred than the substance.

It is said, in some of the cited cases, that the exercise of this power enters within the domain of the State, and interferes with its internal affairs. Granted; but what logical consequence follows? Certainly not that the act of congress is unconstitutional and invalid. From the very nature of the power to lay taxes and excises, its exercise comes right into the heart of the State, and visits its citizens in all their most private relations, estates and property. It is not more searching in its operation than the power to establish a uniform system of bankruptcy, to return fugitives from justice and labor, to call out the militia, to regulate the value of money and fix a standard of weights and measures, and to establish post-offices and post-roads; yet all these, admittedly, enter within the States, and touch most intimately its business and people. Like the taxing power, these are among the express powers of congress, and their rightful exercise within the States is, therefore, undoubted. A notable instance of the exercise of federal power within the bosom of the State is that discussed in the *United States v. Fisher*, 2 Cranch, 258, under the act of congress giving priority in payment to the claims of the United States, out of the estates of decedents. Chief Justice MARSHALL there discussed and settled the interpretation of the nineteenth clause of the eighth section of the first article, conferring the power to pass necessary and proper laws to carry the main powers into effect. In that case, from the duty of the United States to pay their debts, is inferred the power of preserving their own claims as a means of paying debts; and from this was inferred the further power of declaring the claims of the United States first liens on the estates of decedents, thereby entering into the most sacred trusts of the State herself, in which she holds the property of the dead, and changing the order of distribution of that property, placed upon it by State legislation. This right of priority of the United States has been conferred upon the sureties of debtors by way of subrogation.

Without extending the argument unnecessarily, the license tax cases reported in 5 Wall. (U. S.) 462, bear more directly upon the question of power in this case, and, in effect, settle it. It seems to us very clear that the provision of the act of 1866, which excludes

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an unstamped writing or paper from record, and as evidence in any court until the tax be paid, is not a rule for the mere regulation of evidence, but is a disqualification attached to the document, making it incompetent to fulfill its purpose as an instrument of evidence, until the stamp duty is paid; that it is a provision to enforce the payment of the tax of the most necessary kind, and binding on all courts; and that it falls clearly within the express powers of congress to levy taxes, duties, imposts and excises, and to make all laws necessary and proper to carry the taxing power into execution.

The judgment is therefore affirmed.

THOMPSON, C. J., dissented, upon the ground that the legislation alters a rule of evidence belonging to the State tribunals.

SHARSWOOD, J., dissented.

NOTE.—The foregoing case is in conflict with the current authority. See *Bumpass v. Taggart*, (26 Ark. 898), 6 Am. Rep. 628; *Green v. Holway* (101 Mass. 243), 8 Am. Rep. 839; *Dally v. Coker* (88 Tex. 815), 7 Am. Rep. 279; *Burson v. Huntington* (21 Mich. 415), 4 Am. Rep. 487; *Duffy v. Hobson* (40 Cal. 240), 6 Am. Rep. 617; *Davis v. Richardson* (45 Miss. 499), 7 Am. Rep. 88; *Sammons v. Holloway* (21 Mich. 162), 4 Am. Rep. 465; *Moore v. Moore* (47 N. Y. 467), 7 Am. Rep. 466; *Moore v. Quirk* (105 Mass. 49), 7 Am. Rep. 499. — REP.

MCFADDEN, plaintiff in error, v. JOHNSON.

(72 Penn. St. [22 P. F. Smith] 335.)

Damages to land — when claim for does not pass by deed of the land.

Plaintiff was the owner of land through which a railroad was constructed damaging the land. She contracted to sell the land to S., who assigned the contract to defendant. Defendant effected a settlement with the railroad company for the damages done to the land in constructing the road. Plaintiff, without knowledge that defendant had received the damages from the company, delivered the deed to defendant pursuant to contract. *Held*, that she could recover the damages of defendant. Such damages are personal, and do not run with the land or pass by the deed.

ACTION brought by Eliza McFadden against Henry C. Johnson. The plaintiff alleged that she was owner of land through which the Pittsburg and Erie Railroad was constructed in 1856, the land

being thereby damaged; that in 1857 she contracted to sell the land to one Scott, who assigned the contract to defendant; that the Atlantic and Great Western Railroad Company succeeded the Pittsburgh and Erie Railroad Company; and that the defendant in 1862 effected a settlement with the Atlantic and Great Western Railroad Company for the damages done to the land in constructing the road. Without informing plaintiff that he had collected the damages, defendant received the deed from plaintiff pursuant to the contract. This action was brought to recover \$625 damages received by defendant from the railroad company, and \$263.63 unpaid purchase-money. The court ruled that the plaintiff could only recover the amount of purchase-money unpaid, and plaintiff had a verdict for that amount. Plaintiff brought error to this court.

Stoner & Patterson and A. M. Brown, for plaintiff in error.

G. W. DeCamp, for defendant in error.

AGNEW, J. The court below charge the jury that on all the evidence the plaintiff was not entitled to recover, except for the admitted balance of purchase-money unpaid by the defendant. This was an error, the plaintiff having shown that she was the owner of the farm when the railroad company entered upon it, and made the cutting and filling for the railroad track, for which she claimed damages; and that this injury was done by the Pittsburgh and Erie Railroad Company before the road passed into the hands of the Atlantic and Great Western Railroad Company. The facts are clearly proved by a number of witnesses; among them was Mr. Mumford, a land surveyor, and a director of the Atlantic and Great Western Railroad Company, who, as a member of a committee to settle for damages and the right of way, had examined the ground. He testifies distinctly to the profile of the road through the cut and fill, the former thirty feet deep, and the latter twenty-five feet high, at their lowest and highest points respectively. This profile he testified showed the condition of the farm after the grading was done, and that it was the condition in which the Atlantic and Great Western Company took the road. The proof is equally clear that Johnson, the defendant, settled with the company, and received the damages, and this settlement comprised all that had been done upon this farm. The cause seems to have been tried and decided

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upon the principle that unless Mrs. McFadden *reserved* her right to the damages they passed by her sale of the farm to John Scott, who testifies that she did not reserve her right at the time of her sale to him, and that he also did not reserve the right at the time of his sale to Johnson. This was a manifest error; the reverse being true that the damages did not pass either by the article or the deed, unless expressly conveyed. The damages for the injury done to the land while Mrs. McFadden was the owner, were clearly a personal claim, which did not run with the land. If the company entered unlawfully, the entry and work done upon the land were a trespass, and the right to recover damages could be enforced by a common-law action. If the entry were lawful, the company acquired a right, for which the damages (so called) are a compensation, enforceable in the statutory mode given to assess it. *McClinton v. R. R. Co.*, 16 P. F. Smith, 409. In either case,—*quacumque via data*,—therefore the right is personal, belonging to the owner of the land when the entry and injury took place, and could pass only by her assignment. In *Schuylkill Navigation Co. v. Decker*, 2 Watts, 343, the very point is decided, that the damages do not pass by the deed, Chief Justice GIBSON saying: “To the parties proposed to be made defendants it is a decisive objection that they have not title to the damages, which, being in compensation of an injury in the nature of a trespass, could not pass by a conveyance of the land.” The same principle will be found to be asserted and sustained in the following cases: *Hart v. Kucher*, 5 S. & R. 1; *Commonwealth v. Shepard*, 3 Penn. 509; *Reese v. Addams*, 16 S. & R. 40. Instead, therefore, of holding Mrs. McFadden to proof of a reservation of her claim to the damages, the defendant, Johnson, was bound to show that she had parted with her rights which had become invested in him. Neither the articles with Scott nor the deed to Johnson is exhibited; but it is to be presumed, if either contained a transfer, it would have been noticed.

Judgment reversed, and a venire facias de novo awarded.

KING, plaintiff in error, v. BLACKMORE.

(73 Penn. St. [22 P. F. Smith] 247.)

Surety — when liability unaffected by acts of principal.

A leased premises to C, and B became surety for the rent. A distrained for non-payment of rent, but C replevied and re-possessed himself of the goods. *Held*, that the pendency of the replevin suit was not a bar to an action by A against B as surety.

ACTION brought by D. C. King against James Blackmore, on a covenant of defendant as surety for the payment of rent by William Lynn, to whom plaintiff had leased certain premises. The defense was that plaintiff had distrained for non-payment of rent, and that Lynn had repossessed himself of the goods by a writ in replevin, the replevin suit being also then pending. It was claimed that plaintiff could not have two actions pending and undetermined for the same debt. The judgment was in favor of defendant. Plaintiff brought error to this court.

J. W. Hall, for plaintiff in error.

B. F. Lucas, for defendant in error, cited *Quinn v. Wallace*, 6 Whart. 452.

AGNEW, J. This was an action in the court below, against the defendant as surety, upon a distinct, several and independent covenant, as bail absolute to pay the rent of William Lynn, a tenant, in consideration of the letting, and for a valuable consideration, it said also. The instant the rent fell due and was unpaid by Lynn, a cause of action arose against Blackmore, the surety. There cannot be a doubt that King could have sued the tenant for the rent, and brought an action also against the surety, and prosecuted both suits concurrently until he obtained satisfaction from one of them. As the plaintiff's right of action against the surety was immediate, independent and concurrent, it is plain that the distress merely of the goods of the principal was not, *ipso facto*, a bar or a suspension of the plaintiff's remedy against the surety. The true question, therefore, is whether the distress upon the tenant's goods followed

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immediately by a replevin by the tenant and a return to the writ by the sheriff, that he had executed the writ by delivering the goods to the plaintiff in the replevin, is such an extinguishment or satisfaction in law, as will discharge the surety from his separate covenant. On principle clearly it is not, for the goods were not sold, but went back into the possession and custody of the tenant as his own property, and by his own act; and the landlord had in lieu of the distress only the replevin-bond, and the liability of the sheriff for the solvency of the sureties in the bond; both of which were mere choses in action, and not satisfaction *per se*. Even in the case of a levy upon execution, the levy is not a satisfaction when the goods remain in the hands of the defendant in the writ, or are restored to him at his own instance. *Cummins' Appeal*, 9 W. & S. 73; *Lytle v. Mehaffy*, 8 Watts, 275; *Davids v. Harris*, 9 Barr. 501; *Cathcart's Appeal*, 1 Harris, 421. The replevin-bond and sheriff's liability are but a means of producing ultimate satisfaction, but are not in themselves payment of a precedent and absolute debt, as the sureties' debt here was. They are neither money nor goods. The very ground upon which the sheriff's ultimate liability stands was rested by Shippen, president, in the leading case, upon the hardship of the case of the landlord; "for (says he) by the replevin he is divested of the immediate security of his tenant's goods, and yet has no right to interfere in the choice of sureties, that undertake to see them returned when he has established his demand." *Oxley v. Cowperthwaite*, 1 Dallas, 349, 350.

The court below founded its decision on the supposed authority of *Quinn v. Wallace*, 6 Whart. 457. But that case is no precedent for this. That case decided that a landlord who has made a distress on goods of his tenant, cannot make a second distress on the goods of an undertenant without showing that the distress upon the goods of the tenant was insufficient or rendered unproductive by the act of God, or of the tenant himself; and that the burden of the proof of the insufficiency or unproductiveness of the distress lay on the landlord, who, having taken the goods into possession, is presumed to have put them to sale, as he is bound to do under the act of 1872, and consequently has it in his power to show the result of the sale. But the present case is clearly distinguishable from that, on the very ground that the record of replevin and sheriff's return show that the goods were made unproductive by the act of the tenant himself, who has had them returned into his own pos-

session, and the liability of the bond and the sheriff substituted. The record of the replevin and return, therefore, show that the distress was no satisfaction, and consequently no bar to the independent action against the surety on his several covenant as bail absolute for the rent. Nor can the surety or bail complain of this. His liability is original, concurrent and prior to the distress. If he has to pay he will be entitled by subrogation to the security of the replevin-bond. See *Burns v. Huntingdon Bank*, 1 Penna. 395; *Pott v. Nathans*, 1 W. & S. 155; *Armstrong's Appeal*, 5 W. & S. 352. He can prosecute the action of replevin to final judgment, and avail himself of the security of the replevin-bond. In the meantime he can protect himself against the risk of mispayment, by a notice to the tenant, as his principal, to defend the suit of the landlord against himself on his covenant as surety for the rent. Why then should the landlord be deprived of his concurrent remedy against the surety by a replevin, which itself accounts for the distress, and shows that it was made unavailable by the tenant's own act? The consequence flows from the very form which the contract was made to take by the mutual acts of the parties; that is to say, two separate and independent agreements for the debt. Like the several liabilities of drawer and indorser, the remedy against each is complete and independent, and can be pursued, concurrently with the other, to judgment and execution, and can be ended only by actual payment or a legal extinguishment which satisfies the debt. The distress and replevin were not a bar to the plaintiff's action, and the court erred, therefore, in entering judgment for the defendant *non obstante veredicto*.

The judgment is reversed, and judgment is now entered for the plaintiff on the verdict, with interest since the rendition thereof and costs.

Judgment reversed.

KOUNTZ, plaintiff in error, v. KIRKPATRICK.

(73 Penn. St. [23 P. F. Smith] 376.)

Executory contracts — rights of assignee. Measure of damages for non-performance. Market value, how determined.

A sold oil to B "to be delivered, seller's option," at any time until December 31st, at 18½ cents per gallon. B assigned the contract to C, and afterward B entered into a combination to raise the price of the oil in market. C was not implicated in the combination. In an action against A for non-delivery of the oil, *held*, that the right of C to recover was not affected by the acts of B; but that in estimating the damages, the fictitious and temporary price of the oil, resulting from the "corner" in the market, was not the true market value, and the jury would be at liberty to determine, from the prices immediately before and after the date for delivery and from other sources of information, the actual market value of the oil. (*See note, p. 696.*)

ACTION brought by Joseph Kirkpatrick and James Lyons, constituting the firm of Kirkpatrick & Lyons, to the use of Frederick Fisher and others, trading as Fisher Brothers, against William J. Kountz for the non-performance of the conditions of the following memorandum of sale:

"PITTSBURG, June 7th, 1869.

"Sold to Kirkpatrick & Lyons, two thousand barrels good green merchantable crude petroleum * * * to be delivered — seller's option — at any time from this date till December 31, 1869, in bulk cars or bulk boats, at Cosmos Oil Works * * * * *

(Signed) "W. J. KOUNTZ, Seller."

It appeared that Fisher Brothers had held the contract by assignment from Kirkpatrick & Lyons since June 24, 1869. The evidence was conflicting as to whether defendant had any notice of this assignment until December, 1869. It appeared that after the assignment to Fisher Brothers, Kirkpatrick & Lyons entered into a combination to raise the price of oil in the market, and thereby created a "corner." The court ruled that this did not invalidate the claim of Fisher Brothers to recover damages for non-delivery, it not appearing that they were implicated in the combination, in any way. On the question of damages the allegation of plaintiffs was that the market price of oil at the place of delivery December

81, 1869, was 18 cents per gallon. The defense alleged that the fair market price was less than 18 cents per gallon. But the court ruled that the measure of damages was the difference between the contract price and the price as claimed by plaintiffs. Plaintiffs had a verdict for the amount claimed. The defendant brought error to this court.

S. H. Seyer and *G. Shiras, Jr.*, for plaintiff in error. Fisher's right to recover was affected by the acts of Kirkpatrick & Lyons. *Berden v. Berden*, 5 Mass. 67; *Whitney v. Spencer*, 4 Cow. 39; *People v. Bartlett*, 3 Hill, 571; 2 Parsons on Contracts, 189; *Sergeant v. Ingersoll*, 7 Barr. 340; Addison on Contracts, Am. Notes, 880-1122. On the question of damages 2 Parsons on Contracts, 482; *Smithurst v. Woolston*, 5 W. & S. 106, were cited.

M. W. Acheson, for defendants in error.

AGNEW, J. The second, third, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth errors are not well assigned, for all the answers of the court to the points were omitted. When a court simply refuses a point, the error is well assigned by reciting the point, and stating that it was refused. But when the judge answers specially, in order to introduce a qualification he deems necessary to make his instruction correct, the answer must be recited as well as the point. We shall not decline considering, however, all the important questions; and in order to discuss them we may state succinctly the nature of the case. On the 7th of June, 1869, Kountz sold to Kirkpatrick & Lyons two thousand barrels of crude petroleum, to be delivered at his option, at any time from the date, until the 31st of December, 1869, for cash on delivery, at thirteen and a half cents a gallon. On the 24th of June, 1869, Kirkpatrick & Lyons assigned this contract to Fisher & Brothers. Kountz failed to deliver the oil. He defends on the ground that Kirkpatrick & Lyons, and others holding like contracts for delivery of oil, entered into a combination to raise the price, by buying up large quantities of oil and holding it till the expiration of the year 1869, and thus to compel the sellers of oil on option contracts to pay a heavy difference for non-delivery. Fisher & Brothers, the assignees of Kountz's contract, were not in the combination, and the principal questions are whether they are

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affected by the acts of Kirkpatrick & Lyons, subsequent to the assignment; whether notice of the assignment to Kountz was necessary to protect them, and what is the true measure of damages. The court below held that Fisher & Brothers, as assignees of the contract, were not affected by the acts of Kirkpatrick & Lyons, as members of the combination in the following October and subsequently, and that notice in this case was not essential to the protection of Kountz.

The common-law rule as to the assignability of choses in action no longer prevails, but in equity the assignee is looked upon as the true owner of the chose. He may set off the demand as his own. *Morgan v. Bank of North America*, 8 S. & R. 73; *Ramsey's Appeal*, 2 Watts, 228. The assignee takes the chose subject to the existing equities between the original parties before assignment, and also to payment and other defenses to the instrument itself, after the assignment and before notice of it; but he cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract. *Davis v. Barr*, 9 S. & R. 137; *Beckley v. Eckert*, 3 Barr. 292; *Mott v. Clark*, 9 id. 399; *Taylor v. Gitt*, 10 id. 428; *Northampton Bank v. Balliet*, 8 W. & S. 318; *Corsen v. Craig*, 1 Wash. C. C. 424; 1 Pars. on Cont. 193, 196; 2 Story on Cont., § 396, n.

The act of Kirkpatrick & Lyons, complained of as members of an unlawful combination to raise the price of oil, was long subsequent to their assignment of Kountz's contract, and was a mere tort. The contract was affected only by its results as an independent act. It does not seem just, therefore, to visit this effect upon Fisher & Brothers, the antecedent assignees. The act is wholly collateral to the ownership of the chose itself, and there is nothing to link it to the chose, so as to bind the assignors and assignees together. After the assignment, there being no guaranty, the assignors had no interest in the performance of the particular contract, and no motive, therefore, arising out of it to raise the price on Kountz. The acts of Kirkpatrick & Lyons seem, therefore, to have no greater or other bearing on this contract than the acts of any other members of the combination, who were strangers to the contract.

In regard to notice of the assignment to Kountz, it is argued, that having had no notice of it, if he knew of the conspiracy to raise the price of oil, and thus to affect his contract, and that Kirk-

patrick & Lyons were parties to it, he might have relied on that fact as a defense, and refused to deliver the oil, and claimed on the trial a verdict for merely nominal damages for his breach of his contract. Possibly in such a special case, want of notice might have constituted an equity, but the answer to this case is, that no such point was made in the court below, and there does not seem to be any evidence that Kountz knew of the conspiracy, and Kirkpatrick & Lyons' privity, and relying on these facts desisted from purchasing oil to fulfill his contract with them. As the case stood before the court below we discover no error in the answers of the learned judge on this part of it.

The next question is upon the proper measure of damages. In the sale of chattels the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well-established rule, but as this case raises a novel and extraordinary question between the true market value of the article, and a stimulated market price, created by artificial and fraudulent practices, it is necessary to fix the true meaning of the rule itself before we can approach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of value is worth, and this worth is made up of the useful or estimable qualities of the thing. See Webster's and Worcester's Dictionaries. *Price*, on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it. *Id.* Value and price are, therefore, not synonyms, or the necessary equivalents of each other, though commonly, market value and market price are legal equivalents. When we examine the authorities we find also that the most accurate writers use the phrase *market value*, not *market price*. Mr. Sedgwick, in his standard work on the measure of damages, 4th ed., p. 260, says: "Where contracts for the value of chattels are broken by the vendor's failing to deliver property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the

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contract *price* and the market *value* of the article at the time it should be delivered upon the ground; that this is the plaintiff's real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor." Judge ROGERS uses the same term in *Smethurst v. Woolston*, 5 W. & S. 109: "The *value* of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor for a breach of the contract." So said TILGHMAN, C. J., in *Girard v. Taggart*, 5 S. & R. 32. Judge SERGEANT, also, in *O'Conner v. Forster*, 10 Watts, 422, and in *Mott v. Danforth*, 6 id. 308. But as even accurate writers do not always use words in a precise sense, it would be unsatisfactory to rely on the common use of a word only, in making a nice distinction between terms. It is, therefore, proper to inquire into the true legal idea of damages in order to determine the proper definition of the term "*value*." Except in those cases where oppression, fraud, malice or negligence enter into the question, "the declared object (says Mr. Sedgwick, in his work on Damages) is to give *compensation* to the party injured for the actual loss sustained," 4th ed., pp. 28, 29; also, pp. 36, 37. Among the many authorities he gives, he quotes the language of SHIPPEN, C. J., in *Bussy v. Donaldson*, 4 Dall. 206. "As to the assessment of damages (said he), it is a rational and legal principle, that the compensation should be equivalent to the injury." "The rule," said GIBSON, C. J., "is to give actual compensation, by graduating the amount of the damages exactly to the extent of the loss." "The measure is the actual, not the speculative loss." *Forsyth v. Palmer*, 2 Har. 97. Thus, compensation being the true purpose of the law, it is obvious that the means employed, in other words, the evidence to ascertain compensation, must be such as truly reaches this end.

It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz.: compensation, in all those cases where the market evidently does not afford the true measure of value. This

thought is well expressed by LEWIS, C. J., in *Bank of Montgomery v. Reese*, 2 Casey, 146. "The paramount rule in assessing damages (he says) is, that every person unjustly deprived of his rights should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case then before Judge LEWIS is equally true — that is to say — when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be a true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept. *Andrews v. Hoover*, 8 Watts, 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory means, it does not follow that it is, nor was it said in *Girard v. Taggart*, to be the only one. On the contrary, the propriety of the direction there, that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge STRONG took the same view in *Trout v. Kennedy*, 11 Wright, 398. That was the case of a trespasser, and the jury had been told that the

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plaintiff was entitled to the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge STRONG) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price — neither is the true and only measure of value.

These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own State, bearing strongly on this point: *Blydenburgh et al. v. Welsh et al.*, Baldwin's Rep. 331. Judge BALDWIN had charged the jury in these words: "If you are satisfied from the evidence, that there was on that day a *fixed* price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge HOPKINSON said: "It is the price — the market price — of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the *value*, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case,

it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The case of suspended sales upon a rumor tending to enhance the price, put by Judge HOPKINSON, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for non-fulfillment of their bargains. In the same case, Judge HOPKINSON further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to take as that price whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining," says an eminent writer on contracts, "what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value is peculiarly one for a jury." Parsons on Contracts, vol. 2, p. 482, ed. 1857. In *Smith v. Griffith*, 8 Hill, 337-8, NELSON, C. J., said: "I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations, for temporary, special and selfish objects, independent of the objects of lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of

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justice." I may close these sayings of eminent jurists with the language of Chief Justice GIBSON, upon stock-jobbing contracts; *Wilson v. Davis*, 5 W. & S. 523: "To have stipulated," says he, "for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called cornering; in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in which parties deal upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil per gallon, on the 31st of December, 1869, as demanded by the defendant in his fifteenth point. There was evidence from which the jury might have adduced the following facts, viz.: That in the month of October, 1869, a number of persons of large capital, and among them Kirkpatrick & Lyons, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit; that they bought oil largely, and determined to hold it from the market until the year 1870, before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December, 1869, reaching the price of 17 to 18 cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number, says: "It was our purpose to take the oil, pay for it, and keep it until January 1, 1870, otherwise we would have been heading the market on ourselves." Mr. Long says that on the 3d of January, 1870, he sold oil to Fisher & Brother (the plaintiffs) at 13 cents a gallon, and could find no other purchaser at that price. Several witnesses, dealers in oil, testify that they knew of no natural cause to create such a rise in price, or to

make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December, 1869, than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st of January, 1870, except that the so-called combination ceased to buy at the last of December, 1869.

It was, therefore, a fair question for the jury to determine whether the price which was demanded for oil on the last day of December, 1869, was not a fictitious, unnatural, inflated and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfill their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December, 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. It cannot be possible that a "corner," such as took place a few weeks since in the market for the stock of a western railroad company, where shares, worth in the ordinary market about \$60 each, were, by the secret operations of two or three large capitalists, forced up in a few days to a price over \$200 a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation. Our views upon the effect of the affidavit of defense, on which the learned judge in a great measure ruled the question of damages, will be expressed in the case of *Kountz v. The Citizens' Oil Refining Co.*, in an opinion to be read immediately.

Judgment reversed, and a venire facias de novo awarded.

SHARSWOOD and WILLIAMS, JJ., dissented on the question of the measure of damages.

NOTE. — In the case referred to at the close of the opinion (*Kountz v. Citizens' Oil Refining Co.*, 73 Penn. St. 303) the cause of action was similar to this, and it was held that where the affidavit of claim averred that at the time and place of delivery oil was worth 18 cents per gallon, and the affidavit of defense averred that by combination oil was raised to 25 cents, and that the fair market price was less than 18 cents, the issue as to the real market price was fairly raised. — BAR.

BARKER, plaintiff in error, v. DINSMORE.

(73 Penn. St. [23 P. F. Smith] 497).

Sale of goods fraudulently obtained — when bona fide purchaser not protected.

J. S. who pretended to represent B. & Co. called upon D. and contracted with him for wool to be consigned to B. & Co. at P. J. S. also called upon B. & Co. and pretended to be the son of D. and contracted to sell them wool. The wool was shipped by D., consigned to B. & Co., but was received by J. S. who delivered it to B. & Co. and received the value of it. *Held*, that D.'s title was not divested and that B. & Co. were liable to him.

ACTION of replevin brought by John Dinsmore against William Barker, Jr., and Jesse B. Kilgore, constituting the firm of Barker, Jr., & Co., for 45 sacks of wool, of the value of \$3,816.25. It appeared that plaintiff, who resided near Burgettstown, Washington county, was the owner of the wool in question in November, 1869; that a man called upon him saying his name was Barker and pretending to represent the firm of Barker, Jr., & Co., who were wool merchants at Pittsburg. Plaintiff contracted with him for the sale of the wool in question and received a memorandum from the supposed agent signed with the firm name. The wool was to be shipped to Pittsburg, consigned to the firm, and payment was there to be made to Dinsmore when he should call. The same person also called on Barker, Jr., & Co., in Pittsburg, represented himself to be Dinsmore's son and contracted with them to sell wool. The wool in question was shipped to Pittsburg, consigned to Barker, Jr., & Co., and on its arrival it was received by this person, and delivered to the drayman of the firm. The firm paid the value of the wool to the same person. The judge charged the jury that if "you find that this pretended Barker, in the transaction with the plaintiff, John Dinsmore, acquired no title for himself, individually, he could convey no title to the defendants, and your verdict will be for the plaintiff. But if you find from the evidence, that Dinsmore sold the wool to this Barker, as an individual, on his own responsibility, without reference to the fact of his being either a partner with the defendants, or their agent, and if that was the intention of the parties at the time, then the plaintiff will not be entitled to recover, and your verdict will be for the defendants."

The verdict was for the plaintiff for \$3,121.71. The defendants brought error to this court.

A. M. Brown and T. M. Marshall, for plaintiffs in error. The plaintiff intended to change the title by a sale to a person, supposing him to be a member of the firm, and thus enabled him to impose upon the firm, and he must bear the loss. *Parker v. Patrick*, 5 T. R. 175; *Mowry v. Walsh*, 8 Conn. 243; *Root v. French*, 13 Wend. 572; *Smith v. Smith*, 9 Harris, 367. A *bona fide* purchaser of a chattel, for a valuable consideration, in the usual course of trade, and without notice, from a fraudulent vendee, takes a title clear of the fraud, whether it be actual or legal. *Sinclair v. Healy*, 4 Wright, 417; *Mackinley v. McGregor*, 3 Whart. 369; *Thompson v. Lee*, 3 W. & S. 479; *Harris v. Smith*, 3 S. & R. 20; *Robinson v. Dauchy*, 3 Barb. 20; *Buffington v. Gerrish*, 15 Mass. 156; *Morris on Replevin* (2d ed.), 88, 191.

M. W. Acheson, with whom was *W. B. Rodgers*, for defendant in error. No man can be divested of his property without his own consent; and even the honest purchaser under a defective title cannot hold against the true proprietor. *Saltus v. Everett*, 20 Wend. 267; *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Mackin*, 2 Stark. 512; *McMahon v. Sloan*, 2 Jones, 229; *Kingsford v. Merry*, 1 Hurlst. & Norm. 503; *Decan v. Shipper*, 11 Cas. 239.

WILLIAMS, J. The verdict of the jury establishes the fact that the plaintiff below did not sell the wool to the defendants' vendor, as an individual, on his own responsibility, but as a member or agent of the defendants' firm, and upon their credit. Nor was the wool delivered to him by the plaintiff. It was delivered to the railroad company, to be carried to Pittsburg, and there delivered to defendants, to whom it was consigned by the plaintiff. Under the contract of shipment the company had no right to deliver the wool to any person except the consignees; and their delivery of it to the defendants' vendor vested in him no property or right of possession as against the plaintiff. The principle which underlies this case, and by which the rights of the parties are to be determined, is this: The sale of goods by one who has tortiously obtained their possession without the owner's consent vests in the purchaser no title to

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them as against the owner. As a general rule no man can be divested of his property without his own consent and voluntary act. It is true that there are exceptions to the rule, as clearly defined and as well settled as the rule itself, but this case does not come within any of them. Here the defendants' vendor, as we have seen, acquired no right or title to the wool under his contract with the plaintiff, and he did not obtain from him its actual possession. The railroad company had no authority, as the plaintiff's agent, to deliver the wool to him, and their delivery gave him no right or title to it whatever. Nor had he any apparent or implied authority from the plaintiff to sell or dispose of it. It is clear, then, that he could convey no title by its sale; and if so, the defendants could acquire no title by its purchase, though they purchased it for a fair and valuable consideration, in the usual course of trade, without notice of the plaintiff's ownership, or of any suspicious circumstances calculated to awaken inquiry or put them on their guard. The case is a hard one in any aspect of it. One of two innocent parties must suffer by the fraud and knavery of a swindler, who had no authority to act for either. But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it. The case was tried on this principle, and as there is no error apparent in the record, the judgment must be affirmed.

Judgment affirmed.

FOWLER, plaintiff in error, v. SCULLY.

(72 Penn. St. [23 P. F. Smith] 456.)

National bank — validity of mortgage to.

F. gave to a national bank a mortgage to secure notes thereafter to be discounted for him. *Held*, that under the national currency act of June 3, 1864 the mortgage was void, and could not be enforced against the assignee of F for benefit of creditors of F.

SCIRE FACIAS issued by John D. Scully in trust for the First National Bank of Pittsburg, against Silas S. Fowler and William Vankirk, to enforce the payment of a mortgage given by Fowler to

Scully in trust for the bank. Vankirk was the assignee of Fowler, for benefit of his creditors. The object of the mortgage is thus recited in the instrument: "Whereas, the said bank hath agreed to discount for said Fowler an amount in the aggregate not exceeding \$100,000, such negotiable business paper as he shall offer for that purpose, consisting chiefly of bills of exchange, or drafts drawn by him on his customers on account of work, etc., done, and orders filled by him for them from time to time in the course of his business; and Whereas, said Fowler wishes to avoid the necessity of procuring the additional indorsement to said paper by a third party." * * *

The defense was by Vankirk to the effect that the mortgage was void under the act of congress relative to banking companies, of June 3, 1864. The court ordered judgment for plaintiff. The defendant brought error to this court.

G. Shiras, Jr., and Hopkins & Lazar, for plaintiff in error. The mortgage under the provisions of the act of congress is absolutely void, and therefore a suit could not be maintained in it. *E. Anglian Railway v. E. Counties Railway*, 7 Eng. L. & E. 505; *McGregor v. Railway*, 16 id. 180; *Norwich v. Norfolk Railway*, 30 id. 120; *Seneca Bank v. Lamb*, 26 Bark. 695; *Leavitt v. Palmer*, 3 Com. 19; *Tallmage v. Pill*, 3 Seld. 328; *Swift v. Beers*, 3 Denio, 79; *Tyler v. Gates*, 8 Barb. 226; *Green v. Seymour*, 3 Sandf. 286; *Chillicothe Bank v. Swayne*, 8 Ohio, 280; *Miami Exporting Co. v. Clark*, 13 id. 1; *New York Insurance Co. v. Ely*, 5 Conn. 560; *Wheeler v. Russell*, 17 Mass. 258; *White v. Franklin Bank*, 23 Pick. 183; *Merritt v. Lambert*, 1 Hoffman's Ch. 166; *Pearson v. Chapin*, 8 Wright, 9; *Columbia Bank v. Haldeman*, 7 W. & S. 233; *Mitchell v. Smith*, 1 Binney, 110; *Biddis v. James*, 6 id. 321; *Weeks v. Lippincott*, 6 Wright, 474; *Burkholder v. Beeton*, 15 P. F. Smith, 496; *United States Bank v. Owens*, 2 Pet. 537; *Augusta Bank v. Earle*, 13 id. 519; *Perrino v. Ches. & D. O. Co.*, 9 How. 172; *Cappell v. Hall*, 7 Wall. 542.

M. W. Acheson, for defendant in error. The object of the act of congress is to prevent national banks holding large amounts of real estate, and from engaging in land speculations. *Silver Lake Bank v. North*, 4 Johns. Ch. 373; *Baird v. Bank of Washington*, 11 S. & R. 411, 417. A bank may receive mortgages as securities for debts. *Trenton Banking Co. v. Woodruff*, 1 Green's Ch. (N. J.) 117; *Bates*

v. *Bank*, 2 Ala. 465; *Blunt v. Walker*, 11 Wis. 334. There is a distinction between a mortgage to cover future advances at the option of the mortgagee and a mortgage to cover advances which he is bound by the contract to make. *Ter Hoven v. Kerns*, 2 Barr. 96; *Mormey's Appeal*, 12 Harris, 372; *Parmentier v. Gillespie*, 9 Barr. 86. Vankirk cannot assert that the bank has no equities, there being no complaint by the government or by Fowler. *Knowles v. Lord*, 4 Whart. 500; *In Re Roberts*, 2 Barr. 371; *Twelves v. Williams*, 3 Whart. 485; *Foulke v. Harding*, 1 Harris, 242; *Mellon's Appeal*, 8 Cas. 121; *Breeding v. Boggs*, 8 Harris, 33. The government alone can object that the bank acted in excess of its powers. *Silver Lake Bank v. North*, *supra*; *P. & O. R. R. Co. v. Alleghany County*, 13 P. F. Smith, 126; *Leazare v. Hillegas*, 7 S. & R. 313; *Goundie v. Northampton Water Co.*, 7 Barr. 233; *Baird v. Bank of Washington*, 11 S. & R. 411; *Steamboat Co. v. McCutchem*, 1 Harris, 13; *Farnham v. D. & H. Canal Co.*, 11 P. F. Smith, 265; *Chester Glass Co. v. Dewey*, 16 Mass. 94. A contract forbidden by the charter of a company is not necessarily void, except in a direct proceeding by the State. *Grand Gulf Bank v. Archer*, 8 Smedes & M. 151; *Steam Navigation Co. v. Weed*, 17 Barb. 378; *Insurance Bank of Columbus v. U. S. Bank*, 7 Pr. Law Jour. 129, 145; *Lagow v. Badollet*, 1 Blackf. 416; *Bank of South Carolina v. Hammond*, 1 Rich. 281; *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110; *Wooster Bank v. Stevens*, 1 Ohio St. 233; *Richmond Bank v. Robinson*, 42 Me. 589; *Parrish v. Wheeler*, 22 N. Y. 494.

AGNEW, J. The First National Bank of Pittsburg asked the district court to enforce by *scire facias* the payment of a mortgage for future advances. The defendant, the owner of the mortgaged land, asserts that the mortgage is forbidden by the act of congress, which confers upon the bank its charter and all its powers. The simple question is: Is the mortgage valid or void; and if void will the law enforce it? In deciding this question, we must be guided by the federal laws and federal precedents, for the subject is one of federal origin and federal control. The plaintiff is a corporation created and governed by the act of congress, approved the 3d of June, 1864, commonly called the national bank act. What is the federal rule to be applied to such a corporation? In the *Bank of U. S. v. Dandridge*, 12 Wheat. 64, Justice STORY lays down this rule: "Whatever may be the implied powers of aggregate corpora-

tions by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend, both for their powers and the *mode of exercising them*, upon the construction of the statute itself." For this he cites the following language of Chief Justice MARSHALL, in *Head v. Prov. Ins. Co.*, 4 Cranch, 127: "Without ascribing to this body, which in its corporate capacity is the *mere creature of the act* to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be *precisely what the incorporating act has made it*; to derive all its powers from that act and to be *capable of exerting its faculties only in the manner the act authorizes*." These propositions are repeated by himself in *Dartmouth College v. Woodward*, 4 Wheat. 636, and by TANEY, C. J., in *Bank of Augusta v. Earle*, 13 Pet. 587, and *Penrise v. Chesapeake & Delaware Canal Co.*, 9 How. 184. In our own State, the same doctrine is recognized in the case of a national bank. Justice STRONG said: "The bank is a creature of the act, dependent on it for all its powers, and *controlled by all the restrictions which the act imposes*." *Venango National Bank v. Taylor*, 6 P. F. Smith, 14.

This being the settled rule of interpretation, the question is. "Does the act of congress authorize or permit a national bank to take a mortgage of lands, to secure the payment of future loans and discounts?"

The banking powers of these associations are to be found in the 8th section, and are "to carry on the business of banking by *discounting and negotiating* promissory notes, drafts, bills of exchange and other evidences of debt; by buying and selling exchange, coin and bullion; by loaning money on *personal security*; by obtaining, issuing and circulating notes according to the provisions of the act." In view of the rule of interpretation of such charters given to us by the federal courts, and the maxim *expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal security*; for agreeably to this rule and maxim, no other security than personal can be taken for money lent. This is the law of the bank's capacity, and of its control. It accords also with the nature of banking as a business, which is precisely described in the language of the law itself; the *discounting and negotiating* of promissory notes, drafts, bills and other evidences of debts (meaning, of course, debts *ejusdem generis*,

such as checks, certificates of deposits, etc.), the buying and selling of bills of exchange, bullion, and lending of money on personal security. The reasons are manifest. The business of a bank is commercial, not that of dealing in real estate, brokerage, etc. It, therefore, does not buy and sell real estate, ground-rents, mortgages, stocks, produce, etc.

It deals in commercial paper, on the security afforded by the personal responsibility of drawers, indorsers and payers, and this because banks are created for the purpose of trade, which require ready access to loans of money, and discounts on business paper made in the course of trade. Experience also has shown, that whenever banks abandon the legitimate practice of loaning or discounting on the well-known standing of the parties to commercial paper; to lend money on the hypothecation of stocks, real estate, etc., alone in lieu of personal security, they enter an uncertain and unknown region of credit. The directors can well know or ascertain the standing of drawers and indorsers as men of capital or means in the community, but the moment they leave this plain field to enter the region of corporation stocks, real estate and liens, they take a leap in the dark, and must resort to outside agents, such as lawyers, brokers, etc. The internal affairs and condition of a corporation are known to few, while the security of a mortgage rests on both title and liens, requiring professional skill to explore them. The evident intent of congress is, that national banks should be institutions of commerce, not dealers in real estate, stocks or produce. What power there may be to accept a hypothecation of stocks in addition, and to strengthen a loan, we do not say. We are discussing the power conferred to *make or create* loans.

Another obvious purpose of confining their loans of money to personal security, is to prevent these associations from splitting on the rock which has ruined so many banks, to wit: that of lending too much of their capital to one person or firm. The 29th section provides: "That the total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in." Thus congress has prohibited an undue aggregation of its capital in single hands even though each note or bill may be well secured by the names upon it. Then what must we say of large

aggregations of capital in the hands of one man, without personal security on the faith of an estimated value of real estate and the risk of title, and conflicting liens? In the present case we see an aggregate of loans to Fowler, the mortgagor, of \$76,303.59; the very mortgage reciting, that it was taken to dispense with personal security, and to extend to the sum of \$100,000. How much the paid-in capital of this bank is, we do not know. That such a transaction is contrary to the first principles of correct banking and to the charter is obvious.

The intention of congress is manifested by other features of the act. The 35th section declares: "That no association shall make any loan or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent *loss* upon any debt *previously contracted in good faith*, and stocks so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association according to the provisions of this act." What is this, but to repeat to the bank—you must lend money only on personal security. Then comes the 37th section, prohibiting the bank from hypothecating its circulating notes to procure money to pay on its capital, or to be used in its banking operations or from using its notes so as in any form to increase its capital. These two sections, the 35th and 37th, when viewed together, teach another lesson, that these banks shall not live upon themselves, so that when compelled to wind up, creditors and stockholders shall not then discover that their apparent assets are composed of their own decayed viscera, instead of outside personal security. In this way only can the public be made safe against mismanagement.

Here the argument might rest, that the lending of money on mortgage or real estate security is *ultra vires* and forbidden. But congress has left nothing to implication, and in the 28th section has said in what cases these banks may hold real estate, and has forbidden all others. The 28th section reads thus: "That it shall be lawful for any such association to purchase, hold and convey real estate as follows:" Then follow four numbered cases.

"*First.* Such as shall be necessary for its immediate accommodation in the transaction of its business.

"*Second.* Such as shall be mortgaged to it in good faith by way of security for debt *previously contracted*.

"*Third.* Such as shall be conveyed to it in satisfaction of debts *previously contracted* in the course of its dealings.

"*Fourth.* Such as it shall purchase at sales under judgments, decrees, mortgages held by such association, or shall purchase to *secure debts due* to such associations."

Now comes the prohibition against any other mode, and the appointed time such as shall have been legally acquired, shall be held.

"Such association shall *not* purchase or hold real estate in any *other case* or for any *other purpose* than as *specified* in this section, nor shall it hold possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

Thus the section speaks to the bank in plain language — you shall not purchase or hold real estate (besides your banking-house) except in good faith to secure debts already contracted, and you shall not hold in mortmain, for a longer period than five years, that which you can legally take. This section is interpreted also by the 35th section, which forbids the bank from taking its own stock in security, except to prevent the loss of a debt *previously contracted in good faith*; and when stock shall be so taken it shall not be held longer than six months. The language of prohibition in the 28th section is quite clear. The bank "shall not purchase or hold real estate in *any other case* or for *any other purpose* than as specified in this section." The second specified case in this section is, "such as shall be mortgaged to it in good faith by way of security for debts *previously contracted*." The law, therefore, says plainly — you shall not hold a mortgage for future loans, for that is another case.

If any thing were wanting to make plain that which is clear, it is the amendment of the 2d clause in the 28th section, and the debate on it in the senate. See Cong. Globe, April 26, 1864. The amendment of the committee proposed to strike out, "for loans made by such association in the usual course of its banking business or for money due thereto," and to insert "for debts previously contracted," so as to make the clause read, "such as shall be mortgaged to it in good faith by way of security for debts previously contracted." At the call of Senator McDougall, Senator Sherman explained the amendment of the committee to allow the banks to take a mortgage

for a pre-existing debt; but not to loan money on real estate security; "Not to loan money on mortgage?" said Mr. McDougall. Mr. Sherman again replied, "They have no right to loan money upon mortgage; they must take personal security, but after a debt is contracted they may, in order to secure the debt, take a mortgage upon real estate." The amendment was adopted, and the section now stands so.

It is argued, however, that a mortgage is not real estate, and therefore it cannot be said that the bank holds real estate when it holds a mortgage. The criticism is unsound, in forgetting that the law is its own interpreter. A mortgage is one of the four enumerated cases of which the law says the bank may hold real estate as follows. Then follows the second case. It is also one of the cases referred to when the law says, the bank shall not hold in any other case than as specified in this section. The criticism overlooks the fact also that the act as a federal law is intended to embrace the various conditions of the law of mortgage as realty or personalty, in the several States. Even in Pennsylvania, where no court of chancery existed, though viewed only as a security for money, mortgages have been regarded as conveyances of real estate in form and subject to real estate remedies, as by ejectment, and by writ of waste.

The argument founded on the 52d section is unsound. The mortgages therein referred to are of course those which may be lawfully taken for pre-existing debts, which when found among the assets of the bank shall not be so assigned as to create preferences among creditors. The express prohibition of the 28th section cannot be repealed by this reference to mortgages in the 52d section, when so ready a meaning can be found for the latter.

It is a clear and incontrovertible position, therefore, that a national bank cannot lend money on the security of a mortgage, and that its power to take and hold a mortgage is confined to the second case in the 28th section, for debts previously contracted.

It is argued that the mortgage before us is not a mortgage for future advances of money, because of the recital that the bank "hath agreed to discount for said Fowler an amount in the aggregate not exceeding \$100,000, such negotiable paper as he shall offer for that purpose." It is said this is a covenant or obligation on the part of the bank to loan that sum, and, therefore, the money to be lent is not a future loan. But this confounds distinctions and ignores facts. Treat the recital as a covenant to lend, still the

loans and discounts to be made are future. Fowler \$100,000, and if it did, it had a security. The mortgage before us is not to a bank to Fowler, but a debt from Fowler to the \$100,000, which is to consist of negotiable counted for him without the necessity of prior indorsement for said paper by a third party. to make the discounts, the breach of the contract allowed by such damages only as Fowler could draw from the instrument itself. Then there is in the schedule of discounts, that though then the 21st October, 1869, acknowledged and on that day, the first discount claimed under it was 1870, after which come twenty-two others, down to 1870. These are Fowler's debts to the bank in the future to the mortgage. It would be an unconstitutional act of congress if a bank could first receive money, and then found upon its own covenant a line of future loans and discounts.

The distinction between a mortgage to cover the discretion of the mortgagee, and one to be bound to make, recognized in *Ter Hoven v. R* and other cases, has no bearing on the present question. The act was taken to regulate the rights and equities among themselves, but does not change the law itself. The advance in either case is future, the lien is different, just as the creditor was to make the advance.

It is further argued that to prevent injustice the mortgage as delivered anew, on each day. This will do *inter partes*, to prevent wrong; but cannot confer a power upon a corporation, without charter. The error is in forgetting that this is a question of public policy, not of mere equity. Any want of corporate power might be supplied, but the mere interests of parties be made to override the public policy.

Whether VanKirk, the voluntary assignee of the defense here, depends not on his character, but on the question whether the law will aid the defense. If it will not, it is clear that VanKirk, as the

by assignment, and under bond to administer his trust according to law, may and ought to defend for the interests of the creditors. This brings us to the second question stated in the outset of this opinion. The mortgage being void, will the law enforce it? All the authorities, English, Federal and State, say no. Mr. Powell, in his work on Contracts, page 166, says, that all contracts repugnant to the welfare of the State, or against some maxim or rule in law, or in contradiction to some positive statute, are void. Then follow numerous instances. Mr. Comyn, in his work on Contracts, pages 59 to 67, enumerates many statutes upon which contracts have been declared by the courts to be void as *mala prohibita*, and it is not essential that the statute itself should declare the contract to be void.

The doctrine that a contract in violation of the provisions of a statute, though not expressly made void by it, is null and will not be enforced by the courts, is very distinctly stated and sustained by authorities in the case of the *Bank of the U. S. v. Owens*, 2 Pet. 538. JOHNSON, J., said: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country; how can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." The same principles are recognized in *Coppell v. Hall*, 7 Wall. 558. Justice SWAYNE, commenting on the instruction of the court below, that the illegality had been waived by the act of the defendant, says: "In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but of the law itself." Again, "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation." See also *Bank v. Lanier*, 11 Wall. 369. And in *Bank of Augusta v. Earle*, 18 Pet. 587, TANEY, C. J., says: "It may be safely assumed that a corporation can make no contracts and do no acts within or with-

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out the State which creates it, except such as are authorized by its charter."

Coming now to our own State, a long line of decisions testifies that our courts will not lend their aid to enforce illegal contracts. In *Mitchell v. Smith*, 1 Binn. 110, a case of the sale and purchase of a Connecticut title to Pennsylvania lands, SHIPPEN, C. J., says:

'The contract is illegal, being founded on the breach of the law, and of consequence is a void contract and cannot be enforced in a court of law.' In *Siedenbender v. Charles, administrator*, 4 S. & R., it was held that there could be no recovery upon a ticket in an illegal lottery. TILGHMAN, C. J., said: "I consider it perfectly settled that an action cannot be sustained, founded on a transaction prohibited by statute, although it is not expressly declared that the contract is void." Page 160. YEATES, J., said: "The principle of public policy is, that no court will lend its aid to a man who grounds his action upon an immoral or illegal act. Justice as between these individuals would require either payment of the money or reconveyance of the property, but principles of public convenience demand that the justice of the case shall yield to higher considerations, the operation of the precedent on public morals and the public interest. It is for these reasons courts of justice will not assist an illegal transaction in any respect." In *Biddis v. James*, 6 Binn. 329, a case of lottery ticket also, TILGHMAN, C. J., states the same doctrine in fewer words. There is, therefore, no room for equitable presumptions, or estoppels, in cases of illegal contracts. Without protracting the statement too much, I may refer to the following cases of illegal contracts, which the courts have refused to aid by a recovery. *Maybin v. Coulon*, 4 Dal. 298; *Duncanson v. McLure*, id. 308; *Badgely v. Beale*, 3 Watts, 263; *Kepner v. Keefer*, 6 id. 231; *Wagonseller v. Snyder*, 7 id. 343; *Clippinger v. Hepeaugh*, 5 W. & S. 315; *Filson v. Himes*, 5 Barr, 452; *Columbia Bank & Bridge Co. v. Haldeman*, 7 W. & S. 233; *App v. Coryell*, 3 Penn. 494; *Edgell v. McLaughlin*, 6 Whart. 176; *Brua's Appeal*, 5 P. F. Smith, 295. Two of these cases may be noticed particularly on the ground that the contracts were collateral to the illegal act, and that the court refused its aid. *Badgely v. Beale* was for wages as a marker at an illicit billiard-table; and *Columbia Bank, etc. v. Haldeman*, was on a bond of indemnity to a stakeholder for paying over money won on a wager on an election. Here the bank, as plaintiff, asks to recover on an

illegal mortgage; and it follows, from the doctrine stated, that the court will not assist the illegal act; and that the argument in regard to the State, being the only party to avail herself of the illegal forfeiture, has no place here. The defendant has the right to avail himself of the defense, and prevent a recovery. The doctrine of *Leazure v. Hillegas*, 7 S. & R. 313, and cases following in its track, is founded on the law of Pennsylvania as to corporations, that though they may *take* real estate, except for superstitious uses, yet they cannot hold it in consequence of the statutes of mortmain, but as the title has passed into the corporation, it must rest there, till the State enforces the forfeiture. This is very clearly shown by *TILGHMAN*, C. J., in that case. But in the case now before us, as we have seen, the act of congress forbids the taking of a mortgage, except as a security for debts previously contracted. The disability attaches, therefore, to the *acquisition*, and not to the retaining of the mortgage. The transaction is without authority and illegal from the start, and the law will not enforce it. The defendant may, therefore, defend against it, not because of his own merit, but because the law will not suffer itself to be prostituted. This being the rule, it only remains to state the test adopted. "The test," says Judge DUNCAN, in *Swan v. Scott*, 11 S. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." This test has been repeated in the following cases: *Thomas v. Brady*, 10 Barr, 170; *Scott v. Duffy*, 2 Harris, 20; *Evans v. Dravo*, 12 id. 65. The mortgage of Fowler to the plaintiff is, on its face, a security for future advances, and the schedule of the debts claimed under it shows also their subsequent character. The plaintiff could not open its case, therefore, without disclosing that it sought the enforcement of an illegal security—one forbidden by the law. The action must, therefore, fail.

Judgment reversed.

SEARSWOOD and WILLIAMS, JJ., dissented.

SCOTT, plaintiff in error, v. NATIONAL BANK OF CHESTER VALLEY.

(73 Penn St. [28 P. F. Smith] 471.)

Bailment — Liability of bank for deposits for safe-keeping.

In an action to recover of a bank the value of bonds deposited for safe-keeping by plaintiff, and stolen by the teller of the bank, *held*, that the bank being a gratuitous bailee was not liable, although an examination of the teller's accounts, after the theft, proved them to have been falsely kept, and showed that he had been abstracting funds for two years, and although it was known to the president of the bank that he had dealt once or twice in stocks. Mistaken confidence is not a ground of liability in such cases.

ACTION brought by John Scott, Jr., and Amos Scott, constituting the firm of Scott & Brother, against the National Bank of Chester Valley to recover the value of four government bonds of the value of \$1,000 each, which had been placed by plaintiffs with the bank for safe-keeping and which had been stolen by a clerk or teller of the bank. It appeared that when the bonds were deposited the bank gave a check or card in the form : "Scott & Brother left with the bank a package containing valuable securities, said depositor assuming all risk from robbery or otherwise." The teller absconded after the theft, when, on examining his books, it was found that his accounts had been falsely kept for two years, and that he had abstracted funds to the amount of \$26,000. From the evidence he appeared to have had the confidence of the entire community as well as the bank officers. The cashier and president knew that he had dealt in stocks once or twice. The judge charged that the bonds were delivered to the officers of the bank as mere deposites, without any benefit to the depositor so far as had been proved, and for the convenience of the plaintiffs, and the bank was bound to no greater care of the deposit than a person of ordinary care and prudence generally takes of his goods of equal value. The bank was not bound to search into the accounts of the teller for the benefit of a gratuitous bailor, and his loss did not arise out of any account kept by the teller, but from a transaction outside of his employment. It is assumed that if the bonds were stolen by defendant's teller it is liable whether his propensity to steal was known or not, and without regard to his general character.

We instruct you that there is no legal principle as applied to the loss of goods bailed without hire for the accommodation of the bailor. "The defendants had a verdict, whereupon the plaintiff brought error to this court.

W. B. Waddell and *W. Darlington*, with whom was *R. T. Cornwell*, for plaintiffs in error, cited *Story on Agency*, § 452; *Bank of Kentucky v. Schuykill Bank*, 1 Para. 215, 216.

J. S. Futhy and *P. Frazer Smith*, with whom was *G. F. Smith*, for defendants in error, cited *Coggs v. Bernard*, 2 Lord Raym. 909; *Mytton v. Cock*, 2 Strange, 1099; *Finucane v. Small*, 1 Esp. 315; *Shiells v. Blackburne*, 1 H. Black. 158; *Foster v. The Essex Bank*, 17 Mass. 479; *Tompkins v. Saltmarsh*, 14 Serg. & Rawle, 275; *Doorman v. Jenkins*, 2 Ad. & Ell. 256; *Lancaster County Bank v. Smith*, 12 P. F. Smith, 47.

AGNEW, C. J. As early as the case of *Tompkins v. Saltmarsh*, 14 Serg. & Rawle, 275, it was decided that a delivery of a package of money to a gratuitous bailee, to be carried to a distant place, and delivered to another for the benefit of the bailor, imposes no liability upon the bailee for its safe-keeping, except for gross negligence. In that case, the package was stolen from the valise of the bailee, at an inn, in the course of his journey, after it had been carried to his room, in the usual custom of inns in that day (1822). The same rule is laid down by Justice COULTER, *arguendo* in *Lloyd v. West Branch Bank*. He says, a mere depositary, without any special undertaking, and without reward, is accountable for the loss of the goods only in case of gross negligence, which in its effects on contracts is equivalent to fraud. He further remarks, that the accommodation here was to the bailor, and to him alone, and he ought to be the loser, unless he in whom he confided, the bank or cashier, had been guilty of bad faith in exposing the goods to hazards to which they would not expose their own. These rules he derived from *Coggs v. Bernard*, 2 Lord Raymond, 909, and *Foster v. Essex Bank*, 17 Mass. 501. In the latter case, the law of bailment was exhaustively discussed by PARKER, C. J., and the conclusions were as above stated. It was further held, that the degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the bailee uses toward his own property of a similar

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kind. When such care is exercised, the bailee is not answerable for a larceny of the goods, by the theft even of an officer of the bank. It is further said that from such special bailments, even of money in packages for safe-keeping, no consideration can be implied. The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous and for the benefit of the bailor, and no loss can be cast upon the bank for larceny, unless there has been gross negligence in taking care of the deposit. These appear to be just conclusions, drawn from the nature of the bailment. The rule in this case is restated by THOMPSON, C. J., in *Lancaster Bank v. Smith*, 12 P. F. Smith, 54. He says, "The case on hand was a voluntary bailment, or more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence." That case went to the jury on the question of ordinary care, and hence the observation of the chief justice that the same idea was sufficiently expressed by the judge below, in using the words "want of ordinary care." It may be proper, however, to say that want of ordinary care is applicable to bailees with reward, when the loss arises from causes not within the duty imposed by the contract of safe-keeping, as from fire, theft, etc., and hence is not the measure in such a case as that before us, which we have seen is gross negligence. That case was one where the teller of the bank delivered the deposited bonds to a stranger calling himself by the name of the bailor, without taking sufficient care to be certain that he was delivering the package to the right person, and the bank was held responsible for his negligence. Then the teller, in giving out the deposit, was acting in his official capacity, and hence the liability of the bank. The case before us now is different, the bonds being stolen by the teller, who absconded. This teller was both clerk and teller, but the taking of the bonds was not an act pertaining to his business as either clerk or teller. The bonds were left at the risk of the plaintiffs, and never entered into the business of the bank. Being a bailment merely for safe-keeping for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances, the only ground of liability must arise in a knowledge of the bank that the teller was an unfit

person to be appointed or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers should not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but on gross negligence in care-taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care, higher than a gratuitous bailment can create. The question of the bank's knowledge of the character of the teller was fairly submitted to the jury.

But it turned out that after the teller absconded, his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years, to an amount of about \$28,000. It was contended that the want of discovery of the state of his accounts for such a length of time, especially as he had charge of the individual ledger, was such evidence of negligence as made the bank liable. The court negatived this position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor, whose loss arose not from the accounts as kept by him, but from a larceny, a transaction outside of his employment. We perceive no error in this. The negligence constituting the ground of liability must be such as enters into the cause of loss. But the false entries in the books, and the want of their discovery, was not the cause of the bailor's loss, and not connected with it. True, the same person was guilty of both offenses, but the acts were unconnected and independent. True, the bank did not discover in time the injury he did to it, but the very fact that it did not discover his false entries and his peculations, repels the knowledge of his dishonesty. The neglect was culpable, and might have led to responsibility to those with whom they had dealings, if they suffered from that neglect. But this neglect to examine into his accounts was not the cause of the bailor's loss. His loss was owing to the immediate act of dishonesty of the teller, and not to his purloining the funds, or falsifying the accounts of the bank.

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The argument of the plaintiff results simply in this : that mistaken confidence is a ground of liability. But if this were the rule, business would stand still ; for without a common degree of confidence in agents and officers, much of the business of the world must cease. The facts were fairly left to the jury, with the proper instruction.

Another complaint is, that the teller was suffered to remain in employment after it was known that he dealt once or twice in stocks. Undoubtedly the purchase or sale of stocks is not *ipso facto* the evidence of dishonesty, but as the judge well said, had he been found at the gaming-table, or engaged in some fraudulent or dishonest practices, he should not be continued in a place of trust. So, if the president of the bank, when he called on the brokers who acted for the teller in the purchase of the stock, had discovered that he was engaged in stock-gambling, or in buying and selling beyond his evident means, a different course would have been called for. No officer in a bank, engaged in stock-gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on ; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed. Hence any evidence of stock-gambling, or dangerous outside operations, should be visited with immediate dismissal. In this case, the operations of the teller in stocks as a gambler in them, were unknown to the officers of the bank until after he had absconded. Upon the whole, the case appears to have been properly tried, and finding no error in the record, the judgment is affirmed.

Judgment affirmed

LOCKE'S APPEAL.

(13 Penn. St. [23 P. F. Smith] 421.)

Constitutional law—validity of local option laws.

An act of the Pennsylvania legislature authorized the voters of a municipal district to decide, at an election, "for" or "against" granting license for the sale of intoxicating liquors. The act further provided that in case the election should go "against" license, the issuing of such license should be unlawful, and that any person selling such liquors without license should be subject to fine and imprisonment. *Held*, that the act was constitutional.*

INJUNCTION to restrain the city commissioners of Philadelphia from granting license to any person to sell intoxicating liquors in the twenty-second ward of the city. The case involves the constitutionality of the act of May 3, 1871, relating to the granting of licenses to sell intoxicating liquors. By this act it is provided that "at the next municipal election in the twenty-second ward of the city of Philadelphia * * * the voters shall decide 'for license' or 'against license' by depositing their tickets, and that a return be made to the clerk of the court of quarter sessions." Thirty days' notice is required to be given of the election; and the method of receiving and counting the votes, etc., is to be governed by the general election laws of the State. Whenever the election shall go "against" the license, it shall be unlawful for any license to issue for the sale of "spirituous, vinous, malt or other intoxicating liquors in said ward." Any person who shall be convicted of selling, or offering for sale, such liquors without a license, shall be sentenced to a fine of \$50, and confinement in the house of correction or county jail for six months for the first offense, and for each subsequent offense to a fine of \$100, and one year's confinement.

An election having been held under this act, and the election having gone "against" license, this injunction was asked for. The court granted the injunction, whereupon the commissioners appealed to this court.

G. W. Biddle and W. L. Hirst, for plaintiffs in error. The legislature cannot delegate its power to enact a law affecting the polit-

* See to same effect *State ex rel. Sanford v. Court of Common Pleas*, ante, p. 422.

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ical, social or property rights of the citizen. Cooley on Const. Lim. 116, 117; *Rice v. Foster*, 4 Harr. 492; *Parker v. Commonwealth*, 6 Barr, 507; *People v. Stout*, 23 Barb. 338; *Barto v. Himrod*, 8 N. Y. 483; *State v. Swisher*, 17 Texas, 441; *Aurora v. United States*, 7 Cranch, 382; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, id. 122; *Johnson v. Rich*, 9 id. 68; *Moss v. Reading*, 9 Harr. 188; *Railroad v. Clinton Co.*, 1 Ohio (N. S.), 77; *Ex parte Burnett*, 30 Ala. 461; S. O., 32 id. 728. When a power is delegated abridging or enlarging any of those rules of conduct that affect the social and political rights of citizens it is *pro tanto* unconstitutional. *Commonwealth v. Judges*, 8 Barr, 395; *Parker v. Commonwealth*, *supra*; *Commonwealth v. Painter*, 10 Barr, 391; Cooley on Const. Lim. 116, 125; *Commissioners v. Gas Co.*, 2 Jones, 318; *Ex parte Burnett*, *supra*; *State v. Copeland*, 2 R. I. 30; *Maize v. State*, 4 Ind. 351; *Santo v. State*, 2 Iowa, 206; *People v. Collins*, 3 Mich. 415; *State v. Parker*, 26 Vt. 336.

W. H. Rawle and *Porter*, with whom were *W. McElroy* and *F. C. Brewster*, for appellants. An act of the legislature is not to be declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt. *Com. v. Smith*, 4 Binn. 117; *Hiltish v. Catherman*, 14 P. F. Smith, 154; *Bancroft v. Dumas*, 21 Vt. 461; *Wellington v. Petitioners*, 16 Pick. 95; *Respub. v. Duquet*, 2 Yeates, 493; *Com. v. Zephon*, 8 Watts & Serg. 382; *Sharpless v. The Mayor*, 9 Harris, 147; *Speer v. School Directors*, 14 Wright, 158; *Erie R. R. v. Casey*, 2 Casey, 287; *Durack's Appeal*, 12 P. F. Smith, 495; *Pennsylvania Railroad v. Riblet*, 16 id. 164. This kind of law is a police regulation, being applicable only to a business which is hazardous or injurious to the citizens. *People v. Hawley*, 3 Mich. 330.

AGNEW, J. That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another, is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to any other body or authority. The true question in this case is, whether the act of May 3, 1871 (Pamph. L. 523), "to allow the voters of the twenty-second ward of the city of Philadelphia, to vote on the ques-

question of granting license to sell intoxicating liquors," is a delegation of *legislative* power. This must be determined by an analysis of the provisions of the act itself; and depends, not upon the numerical order of the sections, but upon the nature of the legislative determination when the act left the hands of the assembly. Whatever the legislature *then* determined *to be* is *law*, for so much was then a fixed and absolute resolve. What did the legislature then determine absolutely? It enacted in the fifth section that any person who shall hereafter be convicted of selling, or offering for sale, in the twenty-second ward of the city of Philadelphia, any intoxicating liquors, spirituous, vinous, malt or other intoxicating liquors, without a license, *shall* be sentenced to pay a fine of fifty dollars," etc. The provisions of the first, second and third sections are equally imperative and absolute, and may be summed up in a few words, viz.: That a special election *shall* be held in the twenty-second ward at the next annual municipal election, and every third year thereafter; that the constable of the ward *shall* give a certain notice of such special election, at which time the question of license or no license *will* be submitted to the voters of this ward; that the election *shall* be held by the same officers, in the same manner, and under the same penalties prescribed by the general election law, and due returns of the election made in a similar manner. The language is imperative, and the law was absolute in all these respects when the act was approved by the governor. We come then to the fourth section, which provides that whenever, by the returns of election, it shall appear that there is a majority against license, *it shall not be lawful* for any license to issue for the sale of spirituous and other liquors in said ward, at any time thereafter, until at an election, as above provided, a majority of the voters of said ward shall vote in favor of a license.

What did the legislature, in this section, submit to the people, and what did they not submit? This is quite as clear as any other part of the act. Each elector is to vote a ticket *for* license or *against* license. He is allowed by the law to say, "I am for the issuing of license," or "I am against the issuing of licenses," and thus to express his judgment or opinion. But this is all he was permitted by law to do. He declared no consequences, and prescribed no rule resulting from his opinion. Nor does the majority of the votes declare a consequence. The return of a majority is but of a mere numerical preponderance of votes, and expresses only the opinion

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of the greater number of electors upon the expediency or in expediency of licenses in this ward. When this is certified by the return, the legislature, not the voters, declare "it shall (or it shall not) be lawful for any license to issue for the sale of spirituous liquors." Thus it is perfectly manifest this law was not made, pronounced or ratified by the people; and the majority vote is but an ascertainment of the public sentiment—the expression of a general opinion, which, as a fact, the legislature have made the contingency on which the law shall operate. When the law came from the halls of legislation it came a perfect law, mandatory in all its parts, prohibiting in this ward the sale of intoxicating liquors without license; commanding an election to be held every third year to ascertain the expediency of issuing licenses, and when the fact of expediency or in expediency shall have been returned, commanding that licenses shall issue or shall not issue. Then what did the vote decide? Clearly, not that the act should be a law or not be, for the law already existed. Indeed, it was not delegated to the people to *decide* any thing. They simply declared their views or wishes, and when they did so, it was the *fiat* of the law, not their vote, which commanded licenses to be issued or not to be issued.

Now, in what respect does a vote upon license or no license, in a particular ward or township, differ from a vote, whether a new township shall be continued or annulled; or from a vote to determine whether a seat of justice shall be continued where it is, or be removed to another place; or from a vote for or against a subscription by a city to the stock of a railroad company; or from a vote of the people of a district for or against a consolidation of it with a city? Yet in all these instances (to which reference will be made hereafter) it has been decided that the determination of these questions by a vote of the people interested in them, and an enactment of law dependent on the result of this vote, are not a delegation of the law-making power to the people, but a submission only of the expediency of the proposed measure. This is simply common sense, for in none of the instances did the legislature commit to the people the making of the law, but merely the province of determining a matter important to wise and judicious legislation—something upon which the legislature deemed it proper its own act should wait, and then should operate accordingly. The wit of man cannot draw a well-grounded distinction between the result of a vote upon license in a township, and the result of a vote upon the existence of a township,

and the removal of a court-house, or a subscription to stock, or the consolidation of an outlying district with a city.

The legislature in the act of 1871 have given to the people a *law*, not a mere *invitation*; needing no ratification, no popular breath to give it vitality. The law is simply contingent upon the determination of the fact, whether licenses are needed, or are desired, in this ward. And why shall not the legislature take the sense of the people? Is it not the right of the legislature to seek information of the condition of a locality, or of the public sentiment there? The constitution grants the power to legislate, but it does not confer knowledge. The very trust implies that the power should be exercised wisely and judiciously. Are not public sentiment and local circumstances just subjects of inquiry. A judicious exercise of power in one place may not be so in another. Public sentiment or local condition may make the law unwise, inapt, or inoperative in some places, and otherwise elsewhere. Instead of being contrary to, it is consistent with, the genius of our free institutions, to take the public sense in many instances, that the legislators may faithfully represent the people, and promote their welfare. So long, therefore, as the legislature only calls to its aid the means of ascertaining the utility or expediency of a measure, and does not delegate the power to make the law itself, it is acting within the sphere of its just powers.

It is urged that *Parker v. Commonwealth*, 6 Barr. 507, decided the question before us. That case was overruled soon after it was decided, not in express terms, it is true, but its foundation was undermined when it was held that laws could constitutionally be made dependent on a popular vote for their operation. The reasoning in *Parker v. Commonwealth* is fallacious, in assuming the fact that there was a delegation of legislative power. There is much in the opinion well and ably said. The first eight pages may be passed over, and we are brought then to the marrow of the argument, which is contained in the following sentences: After a summary of the act of 1846, Justice BELL proceeds to say, that as a *statute* it "depends for its *validity* and *binding efficacy*, within the several counties named in it, upon the popular vote of designated districts." "Possessing no *innate* force, it remains a *dead letter until breathed upon by the people*, and called into activity by an exertion of their voice in their primary assemblies." "If a majority within the particular district should vote negatively upon the

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question yearly to be submitted to the people, *the act as a statute has no existence.*" "If a majority of the votes be cast in the affirmative, *then the act is to take effect as a statute.*" "It operates *not proprio vigore*, but, if at all, only by virtue of a *mandate expressed subsequently* to its enactment, in pursuance of an *invitation* given by the legislative bodies." "As it left the halls of legislation it was *imperfect and unfinished*; for it lacked the qualities of command and prohibition absolutely essential to every law." I have italicised the portions which show the thought of the opinion and evince the assumption on which the argument rests. If we admit the fact that the law now before us was of this character, an imperfect and unfinished act, a mere invitation to the people to issue their subsequent mandate, and to breathe into it all its vitality, and thus give to it all its validity and binding efficacy as a law, we might have to concede the conclusion that there was a delegation to the people of the power to legislate. But it is beyond cavil that when the act of 1871 left the halls of legislation, it was a mandatory law in all its parts, and the only thing committed to the people was to vote for or against the issuing of licenses, and thereby supply the evidence of expediency. It acts *proprio vigore*, and is called into existence by no subsequent popular mandate. By its command the sale of liquors is forbidden, the popular vote is taken, and its effect declared. This popular vote is but the law's appointed means of determining a result, which the law enacts, in an alternative form, shall be the contingency of its operation. The law did not spring from the vote, but the vote sprang from the law, and the law alone declared the consequence to flow from the vote. The assumption that the act is not a law, till enacted by the people, is the foundation of the argument, and with its fall the superstructure vanishes. The character of this law is precisely that of hundreds of others, which the legislative will makes dependent on some future act or fact for its operation. To assert that a law is less than a law because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare, whenever a law is passed relating to a state of affairs not yet developed, or to things future, and impossible to be fully known. Such an assertion attacks even the moral government of the Creator. God breathes into his creature the power of judgment and discretion, and then declares to him in his law "As you determine your act, so shall be the consequence." The

law is active and operates only when man determines. Does man or God make the law ?

What is more common than to appoint commissioners under a law to determine things upon the decision of which the act is to operate in one way or another ? The courts exercise powers dependent on their own discretion. Take the case of granting a license to keep an inn and sell liquor. The judge determines whether the license is necessary, and if not necessary, the law says to the applicant, "no license." The law takes effect just as the judge determines, yet who says it is the court that legislates ? What is the difference, in essence, whether the necessity for places for the sale of liquors be determined by the people or the court ? Each in its place is but an instrumentality of the law. The judge speaks, the people speak ; but each speaks by the authority of law, and the law commands the consequence. The error of the argument is in attributing the consequence to the voice that speaks, instead of to the law, which makes the people its own mouth-piece, and has beforehand proclaimed the consequence of the utterance. The people, by virtue of the law, declare the expediency of licenses in the ward, and the law itself has already enacted what shall follow this declaration. Though contingent in form, the law is mandatory throughout in all it requires, and all it determines. That is not less an act of sovereign power, which says to the subject, do this, and that shall follow ; do that, and another thing shall follow. To the subject a discretion of acting is given, and as he decides, the law pronounces the consequences. It is the sovereign which gives the law, not the subject.

Then, the true distinction, I conceive, is this : The legislature cannot delegate its power to make a law ; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation. Hence, the necessity of the municipal divisions of the State into counties, townships, cities, wards, boroughs and districts, to which is committed the power of determining many matters necessary, or merely useful, to the local welfare. Can any one distinguish between committing the determining power to the *authorities* of the district, and to the *people* of the district ?

If the power to determine the expediency or necessity of granting licenses to sell liquors in a municipal division, can be committed to a commission, a council, or a court, which no one can dispute, why cannot the people themselves be authorized to determine the same thing? If a determining power cannot be delegated, then there can be no power delegated to city councils, commissioners, and the like, to pass ordinances, by-laws and resolutions in the nature of laws, binding and affecting both the persons and property of the citizens. If a determining power cannot be conferred by law, there can be no law that is not absolute, unconditional and peremptory; and nothing which is unknown, uncertain and contingent can be the subject of law.

If in any case a question could arise upon a delegated power, it would be in that which is delegated to the councils of Philadelphia to make *laws* so called. Look at the language of the 16th section of the act of March 11, 1789: "The mayor, etc., shall have full power and authority to *make*, ordain, constitute and establish such and so many *laws* or ordinances," etc. See also the 7th section of the consolidation act of February 2, 1854: "That the *legislative* powers of the said city shall be vested in two bodies, to be called the select and common councils." In pursuance of this power rights of person and property are regulated; fines and forfeitures inflicted, and discretionary powers are vested in committees, departments and officers. Can there be a clearer instance of the exercise of powers in their nature legislative, by an act of delegation? Yet who believes that this is unlawful, or that it is really a delegation of the law-making power in the sense of a relegation of it from the halls of legislation to the council chambers? On the contrary, the charter of the city is itself the law, which breathes into these *quasi* legislative acts of councils all their life and power, and which, for useful and necessary local purposes, delegated to councils, not the power of making laws, but the discretion and determining power necessary to regulate the affairs of a great city, that owing to distance, and want of knowledge and of time, the legislature cannot determine for itself, but which by its *law* it directs to be done by others. Just at this point the opinion in *Parker v. Commonwealth* evidently labors when it touches this instance of delegated powers, and attributes the efficacy of corporation laws to the consent of the citizens, and affirms that the relation between the municipality and the members is founded in contract. But it is too clear for argument that ordinances derive their binding force from the law which

authorizes them, and not from compacts. The power to pass them is delegated, and the true question is, what is the nature of the delegated power? As already stated, it is merely a determining power, as to matters committed to the discretion of the council by law, not a law-making power *per se*.

Parker v. Commonwealth was decided by three judges to two, with a strong dissent proceeding from the latter. In less than a year afterward a question arose upon a law, authorizing the people to determine by a vote whether a new township should be continued or annulled. *Commonwealth v. Judges Q. S.*, 8 Barr, 391. The only attempt to distinguish the case from *Parker v. Commonwealth*, was by saying that in the latter there was an exercise of sovereignty — of the power of enacting a law by ballot; while in the former there was an exercise of a subordinate function only, for the convenience of public business. But we have already shown that the distinction rests on no difference, and the assumption in *Parker v. Commonwealth* of the delegation of a legislative power being unfounded, the argument fails, and the distinction in *The Commonwealth v. The Judges* falls with it. *The Commonwealth v. Painter*, 10 Barr, 214, occurred a year later; the law authorized the electors of Delaware county to determine by ballot whether the seat of justice should be continued at Chester or be removed to another place, and in the event of a vote for removal, that a commission should select the site, and a court-house be erected.

The law was held to be constitutional, the court not attempting to distinguish it from *Parker v. Commonwealth*, excepting to say that the latter does not reach or cover the case in hand. The law, however, was examined in view of *Parker v. Commonwealth*, and the opinion was delivered by COULTER, J., who had written an able dissenting opinion in that case. Four years later came *Moers v. City of Reading*, 9 Harris, 188. The law provided for taking the sense of the people upon a subscription to the stock of the Lebanon Valley Railroad Company, the subscription being authorized or not as the people should declare by their vote. The law was held to be constitutional, BLACK, C. J., remarking: "It is argued that it is not an exercise of legislative power by the assembly, but a mere delegation of it to the people of Reading. We cannot see it in that light. Half the statutes on our books are in the alternative, depending on the discretion of some person or persons, to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said

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the exercise of such a discretion is the making of the law." This is the precise point which we have endeavored to show was overlooked in *Parker v. Commonwealth*, and the contrary assumed without proof. It is to be noticed, also, that *Moers v. City of Reading* was decided by an entirely new bench of judges. These cases have been followed very recently in *Smith v. McCarthy*, 6 P. F. Smith, 359. A law for consolidating certain outlying districts with the city of Pittsburg was made to depend upon the vote of the people. It was held to be constitutional, THOMPSON, C. J., remarking, "We do not regard it within the principle which forbids the delegation of legislative power." There was also the common school system of the State, which, by the act of the 13th June, 1835, § 13, was made dependent upon the vote of the people of every district, by election every third year. In many parts of the State, the hostility to the law was intensely bitter and the school law was not adopted in some districts for more than twenty years, yet it has never been declared unconstitutional.

I have not thought it useful or necessary to notice the supposed distinction between acts of the legislature as *laws* and as *grants* of sovereign prerogative, for the plain reason, that having by analysis of the act itself and by abundant precedents shown that it is a *law* in its nature and mandatory character, the distinction has no place or application. If it were useful it might not be difficult to show that, in our form of government, all grants of royal prerogative or of franchise are the product of the exercise of the legislative power only, and by the terms of the constitution, in the first section of the first article, must pass by the grant of the legislative power therein, or not at all. The legislature cannot delegate the power of passing laws relating to these subjects, more than they can delegate the power to legislate on other subjects.

Nor have I thought it necessary to refer to the decisions in other States, for the plain reason, also, that our own decisions, since *Parker v. Commonwealth*, rule the case; while that case was the forerunner of the decisions in all the other states (except Delaware), and with its fall they have lost their chief prop and support.

Decree affirmed and special injunction ordered to remain.

REID, C. J., delivered a dissenting opinion in which SHARSWOOD, J., concurred.

GASS' APPEAL

(73 Penn. St. [23 P. F. Smith] 30.)

Church — meaning of "divine service." Injunction.

The G. congregation and the L. congregation entered into articles of association to build a church in which "divine service" only should be held. For a period of twenty years no other than meetings for public worship or preaching the gospel were held in the church. Sunday schools were not in existence in the neighborhood when the church was built. *Held*, that the G. congregation was entitled to an injunction restraining the L. congregation from holding a Sunday school in the church.

BILL filed by Joseph Gass and others, in behalf of the German Reformed Church and Congregation of Lower Augusta, against Joseph Emerick and others, of the Evangelical Lutheran Church and Congregation, to restrain the defendants from using a church building for the purposes of a Sunday school. The facts appear in the opinion. The master, before whom the cause was heard, reported in favor of the plaintiffs; but the court decreed that the bill be dismissed. The plaintiffs appealed to this court.

S. P. Wolverton, with whom was *J. H. Purdy*, for appellants.

S. W. Ziegler, for appellees.

AGNEW, J. This bill, on behalf of a German Reformed congregation, was to enjoin an Evangelical Lutheran congregation from holding Sunday schools in the church building. These congregations built a church for common use, and on the 8th of April, 1848, adopted a "canon law," as they called it, for the government of its use by the two bodies. By the first article of this canon, the church was to be and remain a German Reformed and Evangelical Lutheran church, under the name of "Emanuel's Church." The third and fourth articles provide for funerals and burials in the burial-ground, from which it appears a graveyard was to be used in connection with the church. The thirteenth declares, that each congregation shall have equal right to the church property, and each pastor shall so arrange his *divine service*,

as not to interfere with the pastor of the other denomination. The fifteenth article provides that it shall be allowed to hold *divine service* in two languages, in English and German.

The master finds that *divine service* only was to be held in the church, and that by common understanding of both congregations, no meetings other than those for divine service could be held in it, and that, for a period of over twenty years, no other than meetings for public worship or preaching the gospel were held there ; that a Union Sunday school, organized and kept up by the congregations, was held for many years in a school-house close by the church. A short time ago, the Lutheran congregation withdrew from the Union Sunday school, and established one of their own in the audience-room of the church, in opposition to, and without the consent of, the German Reformed congregation.

This bill is to prevent this unauthorized and continued use of the audience-room for the Sunday school. The master finds, that Sunday schools were not in existence or thought of in this neighborhood at the time of the union of these congregations, and adoption of their rules ; that both congregations understood, and rigidly adhered to the understanding, that a "preaching service" only was to be maintained in the church, and that singing schools, prayer meetings, and the like, were forbidden to be held there. He concludes by saying, he is satisfied, from the articles of association, and the testimony in the case, the preaching of the gospel only was understood by the members of both congregations to be the "divine service" mentioned in the articles. In the court below, the controversy was not upon the facts reported, but upon the meaning of the terms "divine service ;" the defendants holding that they embraced Sabbath schools. The witnesses agree that the German word *Gottesdienst*, used in the articles of union, means in English, *divine service* ; and the court below decided that this included Sunday school service. That prayer and praise, and, indeed, oral as well as written instruction in religious matters, by laymen, are used in Sunday school service, is true, and in a general sense it may be said to be divine service. Indeed, the Reverend Samuel J. Milliken did say, in his testimony, that the more extensive use of the term divine service, includes the performance of any duty arising out of our obligations to God ; but in the more restricted sense it is used to signify acts of religious worship. This would give two significations to these words. Like words of

art, the sense in which they have been used by the parties must, therefore, be sought for. It is the duty of courts to interpret the language of written instruments; but in doing this they always follow the meaning attributed to the terms by those whose custom it is to use them. Therefore, when a contract is capable of two different interpretations, that which the parties themselves have always put upon it, and acted upon, especially as here for a long series of years, a court will follow, because it is the true intent and meaning of the parties which are to be sought for in the language they use. However right it may be to view, as the court did, the Sunday school as a most useful institution in instructing youth in the knowledge and worship of God, and their duties to mankind, this praiseworthy view cannot change a written contract. We cannot engraft on a contract for one thing an agreement for a different thing, though the fruit of the scion be even better than that of the natural stock.

These congregations never so understood or acted upon their agreement of union. They built their church for divine worship, by prayer, praise, and the preaching of God's word. Its use was to be *congregational worship*, not *school instruction*. Their worship was to be led by *pastors*, who should regulate their appointments in due regard to mutual harmony, and was not to be the instruction of youth, even though part of it were in divine things, led by *individual laymen*. There are reasons, also, why a chamber or audience-room, dedicated to public congregational worship, should not be thrown open to thoughtless, giddy, sometimes vicious youths, to deface and soil it. We think the court erred in deciding the case according to the general meaning of the words "divine service," as testified to by some of the witnesses, instead of confining their signification to the sense in which the congregations understood it when they entered into the agreement, and afterward practiced upon it.

A doubt has been suggested as to the jurisdiction of the court in such a case, but, we think, without a solid ground. As unincorporated associations, the parties fall directly within the fifth equity head of the act of 16th June, 1836, conferring on the Supreme and Common Pleas Courts jurisdiction in the supervision and control of unincorporated societies or associations and partnerships. *Foley v. Tovey*, 4 P. F. Smith, 130, is in point, opinion by the present chief justice. The number and relations of these parties,

and the subject and nature of the injury, for the peculiar jurisdiction of equity. The members of each congregation, and the uncertain connection with the congregation, make a convenient nor certain. There would be no bringing a common-law action to remedy the subject of the use is also peculiar. Such is governed by the ordinary rules of tenancy in decided there can be no partition of a church by two congregations, precisely as these two *Brown v. The Lutheran Church*, 11 Harr. WOODWARD, J., is forcible and just, in view of the religious character of a proceeding that would divide graves; that a church cannot be divided; that the State has always been to protect the real estate. A sale is the only mode of partition in such a case, would these graves, of inestimable value, fetch in the market? This case, therefore, falls within the principle of *North Pennsy. Snowden*, 6 Wright, 488.

The nature of the injury, too, is to be noted. It is not of wrong or injury to the property itself, nor of possession, or wrongful withholding of the church from the other, but a mere partition. Here again it differs from *The North Pennsy. Snowden*, and from *Tillmes v. Marsh*, 17. In those cases the bills were what is termed as bills to obtain possession and enforce rights under the articles. The injury consists in a perversion of the rights of a misuse of its privileges under the articles of continuing in its nature. It involves a series of wrongs, and therefore can have no adequate remedy for damages could be conveniently sustained directly within the letter and spirit of the constitution in the second branch of powers contained in the constitution: "The prevention or restraint of the exercise of acts contrary to law, and prejudicial to the community, or the rights of individuals." The church is not only an unincorporated association but is under the control of the court, but the congregation

individuals whose rights are prejudiced by the defendants, and therefore entitled to the exercise of the restraining power of the court. In either way jurisdiction attaches. The right of the plaintiffs is not disputed, which takes the case out of the rule that the court will not enjoin upon a disputed title till it is settled at law. It is only the illegal acts of the defendants that are the subject of dispute, and they are clearly contrary to law, as we interpret the agreement of union. The disposition of this court has been not to deal with these equity powers in a narrow spirit, but to make them serve all the purposes of justice to which they can be made applicable. In *Wesley Church v. Moore*, 10 Barr, 280, Chief Justice Gibson remarked, that "the equitable jurisdiction conferred by these statutes is a valuable, indeed indispensable one, and ought to be extended by every interpretation of which the words are susceptible." The same opinion has found utterance in subsequent cases. *Kirkpatrick v. McDonald*, 1 Jones, 393; *Yard v. Patton*, 1 Harris, 282.

The actual exercise of this valuable power of restraint has been sustained in numerous and analogous cases, which may be briefly noticed, premising that in the same clause is found the supervision and control of partnerships following directly after the supervision and control of unincorporated societies and associations, subjects analogous in the unincorporated membership, and the close and confidential relations of the members in each class. Thus in *Stockdale v. Ulley*, 1 Wright, 486, a partner was restrained from pawning or pledging the notes of the firm for his own debts. So a partner may be restrained from doing acts prejudicial to the estate of a deceased partner. *Holden's Administrator v. McMakin*, 1 Pars. 284. And a person may be restrained from doing business contrary to a lawful agreement not to do so. *Palmer v. Graham*, 1 Pars. 476. So to restrain the use of a party-wall before payment of moiety of the cost. *Sutcliff v. Isaacs*, 1 Pars. 494. To prevent the holder of a legal title from conveying it away contrary to equity. *O'Neil v. Hamilton*, 8 Wright, 18. To restrain associates from denying the right of one chosen by a publishing company as the editor of a paper, and preventing his publication of it. *Peacock v. Cummings*, 10 Wright, 434. To prevent a usurpation of power by a portion of a body which should be a unit, as the Common Council of Philadelphia. *Kerr v. Trego*, 11 Wright, 292. To restrain an unlawful sale under execution of the property of the wife for the

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dict of the husband. *Lyon's Appeal*, 11 P. F. Smith, 15. Without further citation, *Kisor's Appeal*, 12 P. F. Smith, 428, may be instanced as a case in point. There a deed was made of a church property to trustees, for the use of two congregations, with a provision for division in a certain manner, if conducive to the interests of the parties. One congregation took exclusive possession. Held to be a dispute between members of an unincorporated society in relation to their rights and privileges, and not merely as tenants in common of real estate, and equity had jurisdiction to restore the excluded party to their rights. *Sutter v. Trustees of First Reformed Dutch Church*, 6 Wright, 503, is also an authority on this point. The decree of the court below, dismissing the bill, is therefore reversed, and the bill restored, and report of the master confirmed, and it is hereby ordered and decreed, that the defendants named in the bill of the plaintiffs be enjoined and restrained perpetually from using the said church described in the bill, for the purpose of holding Sunday or Sabbath schools therein, and that the defendants pay the costs.

So ordered.

MENGES, plaintiff in error, v. FRICK.

(73 Penn. St. [22 P. F. Smith] 187.)

Statute of limitation — method of computing time.

The statute provided that actions for account should be commenced "within six years next after the cause of such actions, and not after." The last item of an account was dated October 6, 1862, and an action thereon was commenced October 6, 1868. *Held*, that the action was not barred. (*See note, p. 733.*)

ACTION brought by John Menges and another, against Henry Frick and others, constituting the firm of Frick, Billmeyer & Co., upon a book account for lumber furnished by plaintiffs to defendants. The last item of the account was dated October 6, 1862; this action was begun October 6, 1868. The question involved is whether the action is barred by the statute of limitations. The verdict was for defendants; whereupon the plaintiffs brought error to this court.

G. F. Miller, with whom was *J. Porter*, for plaintiffs in error. In computing the time for the running of the statute of limitations, the day on which the debt fell due is to be excluded. *Overton v. Tyler*, 3 Barr, 346; *Sims v. Hampton*, 1 Serg. & Rawle, 411; *Cromelien v. Brink*, 5 Casey, 522; *Pugh v. Duke of Leeds*, Cowper, 714; *Webb v. Fairmaner*, 3 Mees. & Wels. 473; *Young v. Higgon*, 6 id. 49; *Robinson v. Waddington*, 13 Ad. & Ell. (N. S.) 753; *Green's Appeal*, 6 Watts & Serg. 327; *Marks v. Russel*, 4 Wright, 372.

J. M. Linn, for defendants in error. The suit must be commenced within six years from the time the cause of action accrues. *Vanhorn v. Scott*, 4 Casey, 316; *Overton v. Tracy*, 14 Serg. & Rawle, 311. This is, therefore, to be taken to be the understanding of the parties. *Thompson v. Ketcham*, 8 Johns. 189. The presumption is that payment for goods sold is to be on demand. *Warren v. Wheeler*, 8 Metc. 97. The statute runs from the date of a note payable on demand. *Tidd's Prac.* 17; *Taylor v. Whitman*, 3 Grant, 138; *Girard Bank v. Penn Township Bank*, 3 Wright, 92; 2 Kent's Com. 496. The defendants had not the whole of October 6 to pay, but were bound to pay immediately. *Presbrey v. Williams*, 15 Mass. 198; *Glassington v. Rawlins*, 3 East, 407.

WILLIAMS, J. The only question necessary to be considered in this case is, was the plaintiffs' action barred by the statute of limitations? The last item of timber in the account sued on was delivered on the 6th of October, 1862, and the action was commenced on the 6th of October, 1868. The act provides that actions for account shall be commenced and sued "within six years next after the cause of such actions or suit, and not after." There can be no doubt that the cause of action in this case arose on the day the timber was delivered. If that day is to be excluded from the reckoning, the six years had not expired when the suit was commenced. But why, even if the words of the act are to receive a strict and literal construction, should it not be excluded? "Within six years next after the cause of action or suit," as applied to the facts of this case, must necessarily mean within six years next after the day on which the timber was delivered. The day of the delivery must, therefore, be excluded in counting the time within which the action may be brought. If suit may be commenced within six years next after the day on which the cause of action arose, then it is too plain

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for argument that that day is not to be included in the computation. But if there could be any doubt as to the proper construction and meaning of the act, the rule must now be regarded as settled that when an act of assembly requires a thing to be done within a certain time from or after a prior date, and deprives the party of a right for omitting it, the most liberal construction is to be chosen, and the furthest time given from which the reckoning is to be made. In other words, the day from or after which the count is to be made is to be excluded in computing the time within which the act may be done. *Green's Appeal*, 6 Watts & Serg. 327; *Cromelien v. Brink*, 5 Casey, 522; *Marks' Executor v. Russell*, 4 Wright, 372; *Brisben v. Wilson*, 10 P. F. Smith, 452; *Duffy v. Ogden*, 14 id. 240. The court below was, therefore, in error in instructing the jury that the statute of limitations is an available defense to this action, and the plaintiffs cannot recover the account claimed.

Judgment reversed, and a venire facias de novo awarded.

NOTE.—See *Warren v. Slade*, 9 Am. Rep. 70 (23 Mich. 1), and cases cited. In that case a statute provided that every action on a judgment should be brought within ten years next after the judgment was entered and not afterward. Judgment was entered March 15, 1859, and an action was commenced on it March 15, 1869. It was held to have been commenced in time.—RER.

RICHARD, plaintiff in error, v. BREHM.

(73 Penn. St. [23 P. F. Smith] 140.)

Marriage—evidence of.

Defendant and M. lived together as husband and wife for nearly forty years, they addressed each other as husband and wife; she bore his name; land was conveyed to her as his wife; and she made a will describing herself as his wife. In an action by a devisee of M. to recover possession of premises claimed by defendant as tenant by curtesy, defendant testified "by mutual consent we lived as man and wife;" and again "the marriage ceremony was never performed only by mutual consent;" "I promised to marry her." *Held*, that these facts were evidence of a valid marriage not only as to third persons but as between M. and defendant.

ACTION of ejectment brought by Richard H. Brehm against John H. Richard, to recover possession of premises in Philadelphia

devised to plaintiff by Mary E. Richard. The defendant claimed as tenant by curtesy as surviving husband of Mary E. Richard. The question in the case is whether Mary E. had been the legal wife of John H. Richard.

It appeared that defendant and Mary lived together as husband and wife from 1832 to 1870, the time of her death; that they called each other husband and wife; that deeds of land were delivered to her describing her as the wife of defendant; that in March, 1858, she executed a will bequeathing a portion of her estate to her "husband, John H. Richard," and describing herself as "wife of John H. Richard;" that in May, 1870, she made the will under which plaintiff claims describing herself as "Mary Elizabeth Richard, wife of John H. Richard," and by which she devised all her real estate in Philadelphia to plaintiff. The sister of Mary E. Richard testified that defendant told her Mary was not his wife. Defendant testified, "I am no relation to her, only she was my wife." "The marriage ceremony was never performed, only by mutual consent; we lived as man and wife. I promised to marry her before we went to Charleston (1845), about two weeks. Nobody knows that we were not married." The judge charged that while this constituted a marriage as to all the world in matters pertaining to business transactions, yet it was not a marriage as between themselves, and that the defendant could not retain the property as tenant by the curtesy. The plaintiff had a verdict, whereupon defendant brought error to this court.

D. W. Sellers, for plaintiff in error. The concurrent publication of the will of the defendant *as husband*, and of Mary Richard *as wife*, was a celebration and proclamation of the marriage. *Vincent's Appeal*, 10 P. F. Smith, 228. Taking each other as man and wife, with cohabitation and reputation, constituted a marriage. *Com. v. Stump*, 3 P. F. Smith, 132; *Physick's Estate*, 2 Brews. 179; *Vincent's Appeal*, 10 P. F. Smith, 228; *Omohundro's Estate*, 16 id. 113.

W. L. Hirst, for defendant in error.

MERCUR, J. This was an action of ejectment in which the plaintiff brought suit to recover as the devisee of Mary E. Richard. Defense was made principally upon the ground that the defendant

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was the surviving husband of said Mary. That fact was denied and presented the controlling question in the case.

Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties, able to contract, is all that is required by natural or public law. If the contract is made *per verba de præsenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary. 2 Greenl. Ev., § 460. Marriage is a civil contract which may be completed by any words in the present time, without regard to form. *Hantz v. Sealy*, 6 Binn. 405. The fact of marriage then may be proved and established by competent and satisfactory evidence.

What kind of evidence is held to be satisfactory? Marriage may be proved in civil cases, by reputation, declarations, and conduct of the parties, and other circumstances usually accompanying that relation. 2 Greenl. Ev., § 462. For civil purposes reputation and cohabitation are sufficient evidence of marriage. *Senser et al. v. Bower et ux.*, 1 Penn. 450. In all civil cases involving merely the right of property the fact of marriage may be proved by long-continued cohabitation as man and wife. *Thorndell v. Morrison*, 1 Casey, 326. Both cohabitation and reputation are necessary to establish a presumption of marriage where there is no proof of actual marriage. *Commonwealth v. Stump*, 3 P. F. Smith, 132. Marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or State. *Commonwealth v. Stump*, 3 P. F. Smith, 132. Unequivocal and frequent admissions of marriage, accompanied by long-continued cohabitation and reputation, are frequently most satisfactory evidence of marriage. *Vincent's Appeal*, 10 P. F. Smith, 228.

Ought the evidence in this case to have been submitted to the jury to find whether the marriage relation existed between John H. Richard and Mary E. Richard? It shows that from about the year 1832, down to the time of her death in 1870, they lived and cohabited together as man and wife. They recognized and addressed each other as husband and as wife. She called him her husband, he called her his wife. During all that time she bore his name. The three several deeds given in evidence by the plaintiff below, bearing date in 1856 and 1857, show that the land was conveyed to her as the wife of John H. Richard. Upon the 27th of March, 1858, she

duly executed, in the presence of three witnesses, a last will and testament, in which she describes herself as "wife of John H. Richard." She therein gives all the residue and remainder of her estate "unto my said husband, John H. Richard, his heirs," etc.

Again, in the very will under which the plaintiff claims, of the 24th of May, 1870, she describes herself as "wife of John H. Richard."

More than a dozen different witnesses who had been acquainted with them for a time, varying from eight to eighteen years, concur in testifying that during all that time they lived together as man and wife, and were so reputed by all their acquaintances. Thus, for nearly forty years, all those evidences of reputation, declarations, and conduct, which usually accompany the marriage relations, are clearly shown to have existed. The evidence which the learned judge held sufficient to overcome this long-continued and consistent life of the parties, was their separate declarations upon one occasion not long prior to her death, and his testimony upon the trial, that they had never been married. The declarations are proven by a sister of Mrs. Richard, who testifies that was the first knowledge she had of it; and he testifies that the marriage ceremony was never performed. He swears, however, "by mutual consent we lived as man and wife;" and again, "I am no relation to her, only she was my wife." Again he said, "I promised to marry her. Nobody knows that we were not married." It seems to us that the whole testimony is reconcilable, by assuming him to mean that no formal marriage ceremony had been performed by any third person uniting them in marriage; but that they had agreed to a marriage. That they recognized it as a marriage contract, and had always recognized and fulfilled it as such. His declaration made upon one occasion, when angry at his wife, to her sister, that they were not married, after more than thirty-five years of apparent wedded life, was certainly very weak evidence to rebut the presumption of marriage. Nor did his testimony upon the trial necessarily go any further than to negative the one form of entering into a marriage contract. It did not preclude the jury from finding that a valid marriage contract had otherwise been entered into between the parties. The evidence was amply sufficient to have submitted this as a question of fact to the jury. Whether the agreement of marriage preceded or followed the first sexual intercourse, whether it was five or ten years thereafter, if clearly made and proved, it

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established a valid marriage. The learned judge, therefore, erred in virtually taking the case from the jury, and in saying this was not a marriage as to them. He should have affirmed the first point submitted by the defendant below, and to the extent we have indicated qualified the first point submitted by the plaintiff.

We think the evidence referred to in the second and third assignments of error should have been received, so far as it tends to prove the acts and declarations of the parties indicating a subsisting marriage relation existing between them. The other assignments of error are not sustained.

Judgment reversed, and a venire facias de novo awarded.

HOLT, plaintiff in error, v. GREEN.

(73 Penn. St. [23 P. F. Smith] 193.)

Broker — effect of not obtaining license.

A commercial broker who has not procured a license as required by the act of Congress of June 30, 1864, *held* not entitled to recover his commissions in a State court.

ACTION brought by Frederick F. Holt against Joseph Green to recover commissions claimed by plaintiff as broker. The opinion states the case. The plaintiff brings error to this court.

W. W. Montgomery and *R. L. Ashhurst*, for plaintiff in error. The act of congress only affects the right to sue in the federal courts. *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539; *Latham v. Scott*, 45 Ill. 27; *Heister v. Cobb*, 1 Bush. 239; *Carpenter v. Snelling*, 97 Mass. 452; *Lynch v. Moore*, id. 458; *People v. Gates*, 43 N. Y. 40; *Clemens v. Conrad*, 19 Mich. 190; *Griffin v. Ramsey*, 35 Conn. 239.

L. C. Cleemann and *G. Sergeant*, for defendant in error. Courts of justice will not assist a plaintiff in recovering under a contract made in violation of the law. *Maybin v. Coulon*, 4 Yeates, 54;

Mitchell v. Smith, 1 Binn. 118; *Seidenbender v. Charles*, 4 Serg. & Rawle, 159; *Columbia Bank v. Haldeman*, 7 Watts & Serg. 235; *Riddis v. James*, 6 Binn. 329; *Evans v. Hall*, 9 Wright, 236; *Bowman v. Coffroth*, 9 P. F. Smith, 19; *Smith v. Mahood*, 14 Mees. & Wels. 452; *Marshall v. Railroad Co.*, 16 How. 334; *Tripp v. Bishop*, 6 P. F. Smith, 430.

MERCUR, J. The plaintiff brought this suit to recover commissions for the sale of certain machinery sold by him for defendant. It appeared upon the trial of the cause, that the plaintiff was carrying on the business of a commercial broker, and as such broker rendered the services for which the commissions were claimed. He also testified that he had not taken out a license nor paid a special tax, under the act of congress. Upon this the learned judge nonsuited the plaintiff and judgment was entered thereon. This is assigned for error.

The question thus presented is, did the plaintiff's omission to pay the tax and obtain the license as a commercial broker, bar his recovery of commissions for services rendered as such brokers.

The act of congress of June 30, 1864, section 71, provides, that no person * * * shall be engaged in prosecuting or carrying on any trade, business or profession hereafter mentioned and described until he * * * shall have obtained a license therefor, in the manner hereinafter provided. Section 73 provides, that any person carrying on the business without a license shall be liable for each offense to a certain fine and imprisonment therein specified.

Section 79 provides that commercial brokers shall pay \$20 for each license. Any person whose business it is as a broker to negotiate sales or purchases of goods, wares, products or merchandise shall be regarded a commercial broker under this act.

An action founded upon a violation of the laws of the United States or of this State cannot be maintained in the courts of this State. *Maybin v. Coulon*, 4 Dall. 298; S. C., 4 Yeates, 24.

It is not necessary that the statute should expressly declare the contract to be void. An action founded upon a transaction prohibited by a statute cannot be maintained, although a penalty be imposed for violating the law. *Seidenbender et al. v. Charles' Administrators*, 4 Serg. & Rawle, 159. Hence where a contract is made about a contract or thing which is prohibited and made unlawful by statute it is void, though the statute itself does not declare it shall

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be so, but only inflicts a penalty on the offender. *Columbia Bridge Co. v. Halderman*, 7 Watts & Serg. 233. Nor is there any distinction in this State, whether the contract is *malum prohibitum* or *malum in se*. *Columbia Bridge Co. v. Halderman*, 7 Watts & Serg. 235.

The test whether a demand connected with an illegal transaction is capable of being enforced by law is, whether the plaintiff requires the aid of the illegal transaction to establish his case. *Swan v. Scot*, 11 Serg. & Rawle, 164; *Thomas v. Brady*, 10 Barr. 170; *Scott v. Duffy*, 2 Harris, 20. If a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. *Thomas v. Brady*, *supra*. It has been well said that the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed, it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or upon an illegal act. *Mitchell v. Smith*, 1 Binn. 118; *Seidenbender v. Charles' Admrs.*, *supra*. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation. *Coppel v. Hall*, 7 Wall. 558.

Apply these principles to this case. The bill of particulars served on the defendant avers, "the plaintiff's demand is founded on his claim to commissions as a broker or salesman on commission, for the sale of certain cards and other spinning and their machinery of a cotton or woolen mill, put in his hands for sale by the defendant, on or about May, 1866." Upon the trial he testified that his business was buying and selling machinery for other parties. The moment he opened his case, he showed that he was engaged in a business directly contrary to a clear and express act of congress. That for so doing, he was liable to a fine and imprisonment. The intent with which he did it cannot be inquired into in this action. His right to commissions as shown rested upon his illegal acts. His right to recover in law must depend upon his legal right to perform the services. The facts to which he testified showed he had no such right.

Without the aid of his illegal transactions, he could not, and did not, show any services performed. His case as he exhibits it is based upon a clear violation of the statute. He grounds his action

upon that violation. Thus resting his case, he cannot successfully invoke the aid of a court.

We are aware there are some English authorities, as well as decisions in some of our sister States, that make a distinction in cases of contracts predicated of a violation of the revenue laws, and especially that class of them which does not expressly declare the contract to be void. The case of *Aiken v. Blaisdell*, 41 Vt. 655, is a strong case, going to sustain a contract of sale contrary to law. We prefer, however, to stand by our own decisions. The case of *Maybin v. Coulon*, *supra*, was based upon a violation of the revenue laws of the United States, and the unbroken current of authorities in this State is to hold a contract void which is grounded upon a clear violation of a statute, although it may not be expressly so declared by its terms.

Judgment affirmed.

SHARSWOOD and WILLIAMS, JJ., dissented.

BROWN, plaintiff in error, v. COMMONWEALTH.

(73 Penn. St. [23 P. F. Smith] 331.)

Criminal law — written testimony of deceased witness. Dying declarations.

A prisoner was charged with murder, and on the preliminary hearing before the magistrate the testimony of a witness for the State was taken in writing. *Held*, that the notes of the testimony were admissible in evidence on the trial of the prisoner, the witness having died.

A man bearing marks of violence was found dead about three hundred yards from his house. His wife was found in the house with wounds of which she subsequently died. The house had the appearance of having been robbed. *Held*, that the dying declarations of the wife were not admissible in the trial of a prisoner for the murder of the husband.

INDICTMENT against Joseph Brown for the murder of Daniel S. Kraemer. It appeared that the deceased was found dead February 26, 1872, in a lane about 300 yards from his house; and his wife was found wounded on the same day in the house. She died from her injuries March 4, 1872. The house had the appearance of hav-

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ing been robbed. The commonwealth offered in evidence the notes of the testimony of one Ewing, who had been examined at the preliminary examination of the prisoner before a justice of the peace. The notes of the testimony were taken down by B. B. McCool, a member of the bar. Ewing had died. The court admitted the notes in evidence. Evidence of the dying declarations of Mrs. Kraemer in regard to the murder of her husband was also admitted. The jury found a verdict of murder in the first degree. A new trial was denied ; and the prisoner brought error.

G. R. Kaercher, F. G. Farquhar, and B. W. Cummings, for plaintiff in error.

J. B. Reilly, district attorney, and *L. Bartholomew*, with whom was *B. B. McCool*, for the Commonwealth.

READ, C. J. This is a writ of error to the Criminal Court of Schuylkill county, sued out under the act of the 15th February, 1870, upon the oath of the defendant, and brings up the whole record.

The constitutionality and jurisdiction of this court have been finally settled in *Commonwealth v. Green*, 8 P. F. Smith, 226, and in *Commonwealth v. Hipple*, 19 id. 9, and its concurrent jurisdiction with the courts of quarter sessions of the peace and oyer and terminer and general jail delivery of the county of Schuylkill, is fully recognized and established by the act of 22d April, 1870 (Pamph. L. 1254), and the court below were therefore right in overruling the plea to the jurisdiction, entered by the defendant.

On the preliminary hearing before the committing magistrate, the defendant and his counsel being present, a witness was examined whose testimony was taken down by defendant's counsel, and the witness having died before the trial, the notes of his evidence, proved by the counsel under oath, were offered in evidence, objected to and admitted. It was objected that by the constitution of the State the defendant was entitled to meet the witnesses face to face.

The doctrine on this subject is thus laid down in the 3d volume of Russell on Crimes, by Greaves, 4th edition, 1865, page 249. "If there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness, given upon oath at the former trial, is admissible

on the subsequent trial, and may be proved by any one who heard him give evidence," and the same is repeated at page 424, in the note. We find the same rule in 1 Phillips & Arnold's Evidence, pp. 306-7, and in 1 Pitt Taylor on Evidence, 4th edition, 1864, pp. 445, 447. Dr. Wharton, in his valuable Treatise on Criminal Law in the United States, vol. 1, p. 667, says: "The testimony of a deceased witness given at a former trial or examination, may be proved at a subsequent trial by persons who heard him testify. Even the notes of counsel of the testimony of such witnesses on a former trial between the same parties, touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel does not recollect the testimony independently of his notes. The better opinion seems to be that it is sufficient to prove the substance of what the deceased witness said, provided the material particulars are stated, though it has been sometimes held, that unless the precise words could be given, the testimony would be rejected."

In *The Commonwealth v. Richards*, 18 Pick. 434, it was held that the 12th article of the Declaration of Rights, which provides that in criminal cases the accused shall have the right "to meet the witnesses against him face to face," is not violated by the admission of testimony in a criminal trial before a jury to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace."

This case was affirmed seven years afterward in *Warren v. Nichols*, in 6 Metc. 261, and the further ruling in that case "that the whole of the testimony of the deceased witness upon the point in question, and the *precise words used by him* must be proved," was substantially affirmed. HUBBARD, J., dissented from this ruling and assigned very cogent reasons against it. "As the decision now stands," says this able judge, "it prescribes a rule for the admission of testimony, which the imperfection of our nature, in the construction of our memories, will not warrant. It in truth excludes the thing it proposes to admit, and at the same time opens a door for knaves to enter, where honest men cannot approach." "Other learned judges have maintained that a rule so rigid was unwise, and, I confess, I prefer the reasoning of GIBSON, J., in the case of *Cornell v. Green*, 10 Serg. & Rawle, 16, to that of the learned judge in *Commonwealth v. Richards*, and with him agrees also the learned author of the *Treatise on the Law of Evidence*." 1 Greenl., § 165.

Brown v. Commonwealth.

Upon this subject the ablest discussion of the whole question is to be found in the opinion of Judge DRUMMOND, in *The United States v. Macomb*, 5 McLane's Rep. 286, delivered in the Circuit Court of the United States for the district of Illinois, at July term, 1851. At the preliminary examination, a witness, since deceased, testified in relation to the offense, which was robbing the mail. The accused was present and his counsel cross-examined the witness. Witnesses were permitted on a trial before a jury, under an indictment found for the same offense, to prove what the deceased witness testified to at the preliminary examination. It is sufficient in such case to prove substantially all that the deceased witness testified upon the particular subject of inquiry. A decision upon the same point is to be found in *United States v. White*, 5 Cranch's (C. C.) 460.

The 6th article of the amendments to the constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right "to be confronted with the witnesses against him."

The constitution of Pennsylvania of 1776, provided "that in all prosecutions for criminal offenses, a man hath a right to be confronted with the witnesses." The Declaration of Rights, in the constitution of 1790, changed the phraseology from confronting to "meet the witnesses face to face."

The doctrine enunciated by Judge DRUMMOND in 1851 was followed by the Supreme Court of Missouri, after a very exhaustive argument on the constitutional question, in *The State v. McO'Blenis*, in 24 Mo. (3 Jones) 402, and *The State v. Baker*, id. 437, in 1857, and in *The State v. Houser*, 26 Mo. (5 Jones) 431, in 1858, and by the Supreme Court of Ohio in *Summons v. The State*, in 5 Ohio St. 325, in 1856.

In this State the most liberal rule has been adopted, in relation to the evidence of what was testified to by a deceased witness on a former trial or examination, as will be seen by referring to *Cornell v. Green*, 10 Serg. & Rawle, 14; *Chess v. Chess*, 17 id. 409; *Moore v. Pearson*, 6 Watts & Serg. 50, and *Rhine v. Robinson*, 3 Casey, 30, in which case Chief Justice LEWIS said: "The notes of counsel, showing what a deceased witness testified to on a former trial between the same parties touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel did not recollect the testimony independent of his notes, and

although he did not recollect the cross-examination." To which may be added the decision in *Phila. & Reading R. R. v. Spearen*, 11 Wright, 306, the opinion being delivered by my brother AGNEW.

There was, therefore, no error in the court admitting the notes of Mr. McCool of the testimony of Ewing, a deceased witness, in the examination before the committing magistrate, or the notes of any other counsel, or those of the committing magistrate himself.

"Upon the trial of any indictment for murder, or voluntary manslaughter, it shall and may be lawful for the defendant or defendants to except to any decision of the court, upon any point of evidence or law, which exception shall be noted by the court, and filed of record as in civil cases, and a writ of error to the Supreme Court may be taken by the defendant or defendants after conviction and sentence." "If, during the trial upon any indictment for murder or voluntary manslaughter, the court shall be required by the defendant or defendants to give an opinion upon any point submitted and stated in writing, it shall be the duty of the court to answer the same fully and file the point and answer, with the records of the case." Criminal Procedure Act of 31st March, 1860, §§ 57, 58, Pamph. L. 444.

Under this head is ranged the reception under objection of the dying declarations of Mrs. Kraemer, the wife of the murdered man. "The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are constantly admitted in criminal prosecutions, where the death is the subject of criminal inquiry, though the prosecution be for manslaughter; though the accused was not present when they were made, and had no opportunity for cross-examination, and against or in favor of the party charged with the death." "When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating the most impressive of sanctions." 1 Whart. Crim. Law, § 669; 3 Russell by Greaves, 250; 1 Greenl., §§ 156, 162, 346; 1 Taylor on Ev. 616.

"The constitutional provision," says Dr. Wharton, "that the accused shall be confronted by the witnesses against him, does not *abrogate* the common-law principle, that the declarations *in extremis* of the murdered person in such cases are admissible in evidence." *Id.*

In *Woodside v. The State*, 2 How. (Miss.) 655, the court, at page 665, in answer to the constitutional objection that the prisoner had a right to be confronted with the witness against him, say: "But it is upon the ground alone, that the murdered individual is not a witness, that his declarations made *in extremis* can be offered in evidence upon the trial of the accused. If he were or could be a witness, his declaration upon the clearest principle would be inadmissible. His declarations are regarded as facts or circumstances connected with the murder, which, when they are established by oral testimony, the law has declared to be evidence. It is the individual who swears to the statements of the deceased that is the witness, not the deceased." In *Anthony v. The State of Tennessee*, 1 Meigs, 277, the court say, upon the first ground of objection, "We are all of opinion that the Bill of Rights cannot be construed to prevent declarations properly made *in articulo mortis* from being given in evidence against defendants in cases of homicide."

The same doctrine is to be found in *The State of Iowa v. Nash*, 7 Iowa, 347, and in *Robins v. State of Ohio*, 8 Ohio St. 131; *Com. v. Carey*, 11 Cush. 417, and very directly in *Com. v. Carey*, 12 id. 246. There are also various statements to the same effect in most of the decisions cited above in relation to the admission of evidence of the testimony of a deceased witness.

All these cases are confined to the dying declarations of the murdered person upon the trial of the individual accused of the murder. At the York assizes on the 17th July, 1837, in *Rex v. Baker*, 2 Mood. & Rob. 53, it was held, on an indictment against a prisoner for the murder of A by poison, which was also taken by B, who died in consequence, that B's dying declarations were admissible. COLTMAN, J., after consulting PARKE, B., expressed himself of opinion that as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury, but he said he would reserve the point for the opinion of the judges. The prisoner was acquitted. This case is entitled to greater weight, as Baron PARKE, the year before, in *Stobart v. Dryden*, 1 Mees. & Wels. 615, had been considering the question of dying declarations, after full argument, and delivered the opinion of the court. This case is mentioned in 1 Phillips and Arnold, 243, in 3 Russell, 268; 1 Taylor on Evidence, 618.

In *The State v. Terrell*, 12 Richardson (S. C.), 321, it was held upon the trial of an indictment for the murder of A by poison,

which was taken at the same time by B and C, both of whom, as well as A, died from its effects, the dying declarations of B are admissible against the prisoner, although the general rule seems to be, that dying declarations are admissible only where the indictment is for the murder of the party making the declarations. The murder was effected by putting strychnine in a bottle of whisky, administered by the defendant, at the same time, to three persons, and caused the deaths of the grandfather and uncle of the prisoner, and of a third person, whose dying declarations were received in evidence upon the trial of the accused for the murder of his grandfather.

Upon the authority of these cases the learned judge admitted the dying declarations of the wife, upon the trial of the defendant for the murder of her husband. In this there was error, for the husband was found dead on Monday morning, 26th February, 1872, three hundred yards from his dwelling, and his wife was discovered on the same morning lying across her bed in the house in an insensible condition and with her face and head terribly beaten and disfigured. Kraemer and his wife were both advanced in years, and there was no doubt that robbery of gold and silver, which was known to be in the house, led to their murder, but we do not see any facts that would bring these dying declarations of Mrs. Kraemer within those two authorities, supposing them to be good law.

If the prisoner had been tried upon the indictment for the murder of Mrs. Kraemer, her dying declarations would have been strictly legal evidence against him.

The remainder of the opinion relates to a question as to the drawing of the jury.

The judgment is reversed and the record remanded, with this opinion, setting forth the causes of reversal to the court below for further proceeding.

Weber v. Reinhard.

WEBER, plaintiff in error, v. REINHARD, supervisor.

(73 Penn. St. [23 P. F. Smith] 370.)

Constitutional law — Equality of taxation — tax on particular property — Lessee.

A statute of Pennsylvania provided that in addition to taxes already collectible the owners of ore-beds in S. township should pay to the supervisors of the roads one and a-half cent for each ton of ore mined and carried away by teams over the roads. In default of payment the amount should be collected as debts were collected by law. *Held*, that the statute was constitutional and that the owner of an ore-bed was bound to pay the tax, although he had leased it.

ACTION brought by James Reinhard and Benjamin Eisenhard, supervisors of Upper Saucon township, against Charles B. Weber, for the recovery of taxes under the act of April 14, 1868. By this act it is provided "that in addition to the taxes collectible under existing laws, the owner or owners of ore-beds, situated in Upper Saucon township, Lehigh county, shall, from and after the passage of this act, pay to the supervisors of the roads in said township one and a-half cent for each and every ton of ore mined and carried away with teams over the public road, in said township, which said payments shall be made at the end of every six months after the passage of this act; and in default of payment the same to be collected as debts of like amount are collectible by law; provided that the said supervisors shall appropriate to the same purpose, and render an account in the same manner for the funds coming in their hands under this act, as they are required by law with respect to other funds coming to their hands by virtue of their office." The defendant claimed that the statute was unconstitutional and void, and that he had no control over the ore-bed, the products of which were taxed, he having leased the ore-bed to the Bethlehem Iron Company. The plaintiffs obtained judgment. Defendant brought error to this court.

E. J. Moore and Woodward, for plaintiff in error, cited *Phil Association v. Wood*, 3 Wright, 73; *Durach's Appeal*, 12 P. F. Smith, 491.

E. Alfricht, for defendants in error, cited *Sharpless v. Philadelphia*, 9 Harris, 147; *Speer v. School Directors*, 14 Wright, 150; *Pittsburg & C. R. R. v. Commonwealth*, 16 P. F. Smith, 73.

SHARSWOOD, J. *Hammett v. Philadelphia*, 15 P. F. Smith, 146 (3 Am. Rep. 615), was twice argued, each time before a full bench, and was a well-considered case. The principle of it has since been re-affirmed in *Washington Avenue*, 19 P. F. Smith, 352 (8 Am. Rep. 255). It did not question the constitutional right of the legislature to confer upon municipal corporations the power of taxing properties benefited by local improvements for the cost of making or maintaining them, but placed upon it the just and salutary restriction that it should be limited to the special benefits conferred by the improvements, and not extend beyond them; that the legislature could not authorize a tax to be levied on particular property in a designated locality for a general purpose, to which the whole community ought equally to contribute. Such a tax was in effect only a mode of taking private property for public use without making compensation. An examination of the facts will evince that the judgments in those cases have this extent—no more. The opinion in *Hammett's* case had been published immediately after the first argument, though not reported until after the second. It was cited, and was the main reliance of the appellant in *Durach's Appeal*, 12 P. F. Smith, 491, which settled, however, the principle which seems to us to be decisive of the main question raised on this record, to wit, the constitutionality of the tax imposed upon the owners of ore-beds in Upper Saucon township, Lehigh county, by the act of assembly, of April 14, 1868. Pamph. L. 1127. It was there held that while the legislature cannot, under the name of taxation, take private property for public use without compensation, and that, therefore, a special tax on individuals or particular properties would be unconstitutional, yet in the exercise of the power of taxation, persons and things may be legitimately classified—some kinds may be assessed and others not—and that even special exemptions are not unconstitutional. There is no provision in the constitution that taxation shall be equal. Sound policy requires that it should be so far as possible. But perfect equality is not possible. Indeed, if this were necessary there could be no taxation, except such as

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would include every person and every thing, which would manifestly be impracticable and unjust.

It is gravely contended, however, that this court has the power to set aside unjust, unequal and improper legislation relating to taxation, and *Philadelphia Association v. Wood*, 3 Wright, 73, is relied on as establishing this position. There are many things contained in the opinion in that case entirely aside from the point decided, and therefore mere *obiter dicta*. All that was determined was that an act of assembly which required all agencies for foreign insurance, trust and annuity companies in the city of Philadelphia to pay two per cent of their gross premium to an association for the relief of disabled firemen, was not taxation at all; it was taking the property of A and giving it to B, whether for a charitable or any other mere private purpose it mattered not. No doubt after money raised by taxation has reached the public treasury it may be appropriated by the legislature to charities or individuals. It was admitted, indeed, that the tax in that case would be clearly constitutional, if it had been levied for and paid into the public treasury, and the idea that the court could pronounce a tax unconstitutional on the mere ground of injustice or inequality was expressly repudiated.

It has been urged, however, grounded upon an opinion expressed by Chief Justice LOWRIE, in the case last cited, that it is not competent for the legislature to provide for the collection of taxes by action in the courts; that it would turn the courts into tax collectors. But all personal actions are processes for the collection of money, and the courts are no more collectors of taxes in the one case than they are collectors of private claims in the other. It is the sheriff who is the collector when it is adjudged that the tax or debt is due, and surely there is nothing incongruous in that. He is the best and most efficient of all collectors, and never objects to the performance of that function, for he is well paid for it. All that the courts are required to do is to decide whether the debt or tax is payable by the defendant, and what the amount of it is. That is a purely judicial transaction. This mode of enforcing the payment of taxes may be unusual, but what provision of the Bill of Rights or of the constitution of government does it infringe? As well might it be maintained that fines, forfeitures and penalties could not thus be enforced, and of examples of these the statute book is full. So municipal liens for taxes and assessments

have been collected by actions of *scire facias* in the courts, and no one has ever thought that it was unconstitutional. No doubt the legislature might provide a summary process in all cases of public claims. But what right has the citizen to complain if instead of this he is secured a trial by jury to ascertain his liability before he can be compelled to pay? He would have better ground to complain if it had been denied to him.

It is also maintained, and in this contention it must be admitted that there is much plausibility, that there are difficulties in carrying this act of assembly into execution, by reason of the want of any provision for the ascertainment and assessment of the amount payable by each owner of an ore-bed. It would have been better if the legislature had provided that the owner should make a return of the number of tons hauled over the public roads, and in default of his doing so, authorized the supervisors to assess the amount. But can we set aside an act of assembly, because its machinery is lame and imperfect? Our duty is to execute the legislative will in the way prescribed, when that way is constitutional, though a much better way might have been devised. We are bound to give the act a reasonable construction, *ut res magis valeat quam pereat*. When the owner refuses or neglects to pay the tax, the legislature has imposed upon the township the burden of proving by evidence, satisfactory to a jury, all that is required to fix liability upon the owner of the ore-bed. This may be unwieldy, but it is surely not unjust to the tax payer. He can save himself from the costs of a suit, by a tender, in time, of the amount actually due. It is not a case where a valuation of property is required. It is a fixed rate upon the number of tons, and that the owner may be presumed to know, or to have the means of ascertaining, whether he is a landlord, or himself the actual occupant. It is not, indeed, expressly provided that the supervisors shall ascertain and assess the amount. But they must do so in order to maintain their suit, and recover a judgment; and they must do more; they must prove it by competent evidence. In this case, as appears by the affidavit of claim filed, there was a demand of a certain sum, and the plaintiff in error did not deny in his affidavit that the amount was correct.

Nor can it be doubted that the plaintiff in error is liable for the tax. He admits himself to be the owner of the ore-bed, and in the sense of tax laws of this commonwealth, the owner of lands is always the landlord, and not the tenant, when they are occupied

Seventh National Bank v. Cook.

under a lease. See act of April 6, 1802, § 8; 3 Smith, 516; act of April 3, 1804, § 6; 4 Smith, 203; act of April 15, 1834, § 46; Pamph. L. 518; *Caldwell v. Moore*, 1 Jones, 58.

It is unnecessary to consider the contention, that the imposition of this tax impairs the obligation of the contract between the landlord and tenant, for it is too clear for argument, that a tax upon the subject-matter of a contract, by whichever party it is made payable, can never produce that effect.

Judgment affirmed.

READ, C. J., and WILLIAMS, J., concurred in this opinion, except as it relates to the extension of *Hammett v. The City*, beyond the case itself.

AGNEW, J., dissented.

SEVENTH NATIONAL BANK, plaintiff in error, v. COOK.

(73 Penn. St. [23 F. F. Smith] 432.)

Bank—liability to holder of check.

G drew a check on a bank payable to C. B. indorsed the check without authority from C. and drew the money on it from the bank. The check was charged by the bank against G. and returned canceled to him. C. obtained the canceled check from G. and presented it to the bank for payment which was refused. *Held* that C. could recover the amount of the check from the bank.

Where a bank receives a check drawn upon it and charges it against the drawer and settles with him upon that basis, the payee of the check has a right of action against the bank for the amount of the check. (*See note, p. 752.*)

ACTION brought by David Cook against The Seventh National Bank of Philadelphia, upon a check which the defendant refused to pay to plaintiff. The opinion states the case. The verdict was for plaintiff; whereupon defendant brought error to this court.

W. S. Price, for plaintiff in error, cited *Bank of Republic v. Millard*, 10 Wall. 152.

READ, C. J. James Greenwood was indebted to David Cook for oil sold, and in payment gave a check on the defendant, The Seventh National Bank, for \$174.50, to J. C. Barnes, a clerk of the

plaintiff, payable to the order of D. Cook. Mr. Barnes indorsed it with the name of D. Cook, and his own name, drew the money, and appropriated it to pay an amount due him by his employer, and made the proper entries on the books of D. Cook. The plaintiff refused to recognize the acts of his clerk, and obtained the canceled check from Greenwood, presented it to the bank, was refused payment, and then commenced this suit. The court charged the jury that "the only question is, whether Barnes had authority to indorse the check for Cook, and upon that I leave the case with you," and the jury found a verdict for the plaintiff Cook, for the amount of the check. Upon the argument the counsel for the bank cited but one case, *Bank of Republic v. Millard*, 10 Wall. 152, and contended the holder of the check could not recover against the bank. It was in evidence that the bank had paid the check when presented by Barnes, and that upon settlement of Greenwood's bank-book, the check was returned with other checks, canceled, and, of course, charged against the depositor. This brings it within the exception stated by the Supreme Court of the United States toward the close of their opinion in 10 Wallace: "*It may be* if it could be shown that the bank had charged the check upon its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank having assented to the order, and communicated its assent to the paymaster (the drawer), would be considered as holding the money thus appropriated for the plaintiff's use, and, therefore, under an implied promise to him to pay it on demand."

On the merits, therefore, the case was for the plaintiff.

It is, in fact, an acceptance, and binds the bank as a certified check does. "It is tantamount to an acceptance of the draft."

There is nothing in the other assignments of error.

Judgment affirmed.

NOTE.—See *Aetna National Bank v. Fourth National Bank* (46 N. Y. 89), 7 Am. Rep. 314, and *Carr v. National Security Bank* (107 Mass. 45), 9 Am. Rep. 6, and note. In these cases it was held that the bank on which a check is drawn is not liable thereon to the payee or holder of the check, in the absence of some special matter creating a privity between the bank and the payee or holder. Some cases holding the contrary are mentioned in the note to *Carr v. National Security Bank*. In *Fourth National Bank v. City National Bank*, 9 Alb. Law J. 338, the Supreme Court of Illinois in 1874, held on the authority of *Munn v. Church*, 25 Ill. 35, that the holder of a check who has paid value for it was entitled to so much of the drawer's funds in the hands of the drawee as the check called for and had a right of action therefor, unless other equities had intervened. The case has not yet been reported in the regular series.—*EMF.*

PENNSYLVANIA RAILROAD COMPANY, plaintiff in error, v. BEALE.

(73 Penn. St. 504.)

Contributory negligence — injury to traveler at railroad crossing.

The line of a railroad was obstructed from the view of a traveler on a highway who was approaching a crossing, in a wagon. He did not come to a full stop before attempting to cross the track. *Held*, that this was contributory negligence, defeating a recovery for the death of the traveler by collision with a passing train at the crossing.

The failure of a traveler to stop, immediately before crossing a railroad track, is negligence *per se*.

ACTION brought by Elizabeth Beale and others, the widow and children of Thomas Beale, deceased, against the Pennsylvania Railroad Company, to recover damages for the death of Thomas Beale, caused by the alleged negligence of defendant. The deceased was driving on the highway, with his son, in a spring wagon, near Patterson, Juniata county, and on attempting to cross the railroad track, the wagon was struck by a passing train, and he was killed. The question involved in the case was, whether deceased was guilty of contributory negligence. It appeared that the line of the railroad was obstructed from view in the direction of the approaching train, by a hill. The son testified that they approached the track on a very slow walk, to hear if any trains were coming; but did not stop entirely. The judge charged the jury:

"From this evidence it is manifest, that deceased did not come to a full or complete stop, and, although he listened for the approach of cars whilst he was slowly going in the direction of the crossing, yet he did not look for any approaching train, save immediately in front and in the direction he was traveling. You will remember, the proof is, there was a high bluff or hill that intercepted or shut out the view of the cars in approaching the crossing from the west, at the cave, the point where the deceased slackened the pace of his horse and listened. This point was about 75 feet from the track. It is manifest, that if deceased had looked from this point for a train approaching the crossing, that it would have done him no good, for the bluff or hill obscured it from view. Whilst the law is fixed and settled, that it is the duty of the traveler, in crossing

a railroad along a highway, to stop, look and listen before he goes upon the track, yet we do not understand the rule to be of such universal application as to control a case where stopping, listening and looking would have been in vain." "The evidence is uncontradicted, that there was a level space of ground, about 10 feet wide, between the hill or bluff and the first track or siding, on the approach to the track from the valley, upon which deceased was traveling. It was the plain duty of the deceased to have stopped there, and to have looked and listened for the approach of the train, if you find, from the evidence, that the approach of the train might have been seen or heard from there."

The verdict was for plaintiffs for \$1,000. The defendant brought error to this court.

L. W. Hall, with whom was *E. J. Doty*, for plaintiffs in error. A traveler crossing a railroad must stop and look up and down, because the presumption is that a train may be approaching. *Penn. Canal Co. v. Bentley*, 16 P. F. Smith, 30. Where, as in this case, the negligence of the deceased is clear, the court should so determine as matter of law. *Pittsburg & C. R. R. v. McClurg*, 6 P. F. Smith, 294; *West Chester & Phila. R. R. v. McElwee*, 17 id. 311; *Catawissa R. R. v. Armstrong*, 2 id. 286; *Penn. R. R. v. Ogier*, 11 Casey, 71. Not looking for a train is an entire failure of performance of duty. *Penn. R. R. v. Heileman*, 13 Wright, 64; *Hanover R. R. v. Coyle*, 5 P. F. Smith, 396; *Reeves v. Del., L. & W. R. R.*, 6 Casey, 464.

J. W. Parker and *E. D. Parker*, for defendants in error. The obstructions to vision and hearing being such as that the stopping of the deceased would have been of no avail, there was no obligation on him to do so; the question of negligence was for the jury. *Phila. & Trenton R. R. Co. v. Hagan*, 11 Wright, 244; *Hanover R. R. Co. v. Coyle*, 5 P. F. Smith, 396; *Penn. R. R. Co. v. Goodman*, 12 id. 329; *West Chester & Phila. R. R. Co. v. McElwee*, 17 id. 311.

SHARSWOOD, J. The evidence of the plaintiffs below showed a clear case of contributory negligence in the deceased. The crossing at which he met with the injury which resulted in his death, was a dangerous one, and as he was well acquainted with it, there

was the greater reason that he should have exercised more caution, by stopping at the railroad crossing. It is very clear that if he had done so, the accident would not have happened. The learned judge in his charge, "is unqualified to say that the level piece of ground, about 10 feet wide, and the first track or siding on the opposite side of the valley upon which the deceased was standing, was his duty to have stopped at that place. The judge instructed the jury, but he qualified his instruction by saying, "if you find from the evidence that the deceased might have been seen or heard from the crossing, the question of negligence to the jury. Indeed, the duty of stopping is more than a duty. If the train cannot be seen or heard through the trees, of a track is unobstructed, and no train is coming, it might, perhaps, be asked, why should a traveler be in danger of collision — none take the trouble to look across the track the better to see if there is any necessity there was of stopping. In a case of collision the rule must be an absolute one. If a man cannot see the track by looking out, he should get out, and if necessary, he should get out. A prudent and careful man would always do so. In *The Hanover Railroad Co. v. Coffey*, the plaintiff, a peddler, in the depth of a winter, covered wagon, with his head muffled in a blanket, it appeared that a traveler passing in the distance could not see up and down the track. Under these circumstances were not allowed to be negligent in omitting to stop. The principle settled then that the fact of a traveler being immediately before crossing a railroad track, is not negligence for the jury, but negligence for the court. *North Pennsylvania Railroad Co. v. Coffey*, 60. It was important not so much to the traveling public. Collisions of this kind are the cause of the loss of hundreds of valuable lives, and they will do so again, if travelers are not taught their simple duty, not to themselves.

error of submitting the question to the jury whether if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should upon the uncontradicted evidence have directed a verdict for the defendants.

Judgment reversed.

WILLIAMS and MERCUR, JJ., dissented.

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ACKNOWLEDGMENT.

Of mortgage — parol evidence of.] The acknowledgment of a mortgage of real estate was in the form: "E. County, ss: Before the subscriber, a justice of the peace of said county," etc. The justice was of C. county, the land was situated there, and the mortgage was recorded there. *Held*, (1) that the mortgage was properly on the record, and was a notice to subsequent purchasers; and (2) that parol evidence was admissible to show that the acknowledgment was taken in C. county. *Angier v. Schieffelin* (Penn.), 659.

ACTION.

1. *For refusal to transfer stock.]* An action lies for damages against a private corporation for refusal to transfer stock on the books, to one entitled. *Kimball v. The Union Water Company* (Cal.), 157.
2. *On debt discharged in bankruptcy.]* An action will lie on a debt which has been discharged in bankruptcy where there has been a promise to pay it made subsequent to the discharge. *Dusenbury v. Hoyt* (N. Y.), 548.
3. *Against carrier — when transitory.]* An action against a common carrier for an illegal discrimination in the carriage of goods is transitory, and may be maintained in one State though the offense was committed in another State, provided the discrimination was unlawful where practiced. *McDuffee v. Portland & Rochester R. R. Co.* (N. H.), 72, and *note*, 87.

AFFIDAVIT.

Of jurors.] See NEW TRIAL, 283.

AFFREIGHTMENT.

See SHIP AND SHIPPING.

AGENCY.

1. *Liability of town committee for negligence of contractor.]* Defendant was one of a town committee for the purpose of improving a pond to supply the town with water. It was found necessary to clear a strip of land on the shore of the pond, and the land was purchased by the town for the purpose. The committee contracted for the clearing of the strip with one N. at an agreed price. N., after preparation, set fire to the brush, etc., on the strip, and, through his alleged carelessness, the fire escaped and destroyed some of plaintiff's timber and fences. *Held*, that defendant was not liable for the negligence of N. by reason of any relation between him as committee and N. as contractor, N. having exclusive control of the clearing under the contract. *Wright v. Holbrook* (N. H.), 12.

2. *Carrier is not agent of passenger.*] The driver of a horse car is not the agent of a passenger so as to render the latter chargeable with the negligence of the former. *Bennett v. New Jersey, etc., Ry. Co.* (N. J.), 435.
3. *Death of co-agent.*] Where a firm are employed as agents their authority is terminated by the death of one of the partners. *Martins v. International Life Ins. Society* (N. Y.), 529.
4. *Undisclosed principal — when express company liable for money collected on forged draft.*] Defendant, an express company, received for collection a draft drawn upon the plaintiff, presented it for payment and received the money thereon, without disclosing its agency to plaintiff. The payee's indorsement had been forged upon the draft, and the plaintiff was afterward compelled to pay the amount thereof to the payee. In an action to recover the amount paid to the defendant, *held*, that the plaintiff could recover on the ground that the defendant did not, at the time, disclose its agency. *Holt v. Ross* (N. Y.), 615.
5. *Liability of collecting agent — Mercantile agency.*] Defendants, who carried on a "mercantile agency," received from plaintiffs drafts and gave a receipt purporting to be a receipt of the drafts "for collection." They transmitted the drafts to their agent at the place where they were payable. The agent collected them, but failed to pay over the proceeds. *Held*, that defendants were liable. *Bradstreet v. Ebberson* (Penn.), 665.

ALIMONY.

One unable pecuniarily to pay alimony adjudged against him, is not guilty of contempt of court in not paying it when he has not voluntarily created the inability for the purpose of avoiding payment. *Galland v. Galland* (Cal.), 167.

ALTERATION OF INSTRUMENT.

See NEGOTIABLE INSTRUMENTS.

ANCIENT LIGHTS.

Easement of, when sustained.] *See* EASEMENTS, 629

ASSAULT AND BATTERY.

What amounts to — touching the person.] In a prosecution for an assault and battery, the court charged the jury that if the defendant beat the prosecutor's horse while being driven by the prosecutor, he was guilty. *Held*, error, as the beating of a horse did not, in law, amount to a battery on the prosecutor. *Kirkland v. State* (Ind.), 886.

ASSESSMENT.

1. *Payment of money levied on void assessment.*] If property is assessed for widening a street, not to the true owner, but to a stranger, and the owner pays the money to prevent a sale by the tax collector, he will be deemed to have known when he paid it that a sale by the tax collector would be a nullity, and would not invest the purchaser with even a colorable title and in such case the payment will be deemed voluntary. *Bucknall v. Story* (Cal.), 220.

2. *Recovery of money paid on void assessment.*] Where an assessment is void upon its face, because made to one who does not own the property, and the true owner, with a knowledge of the fact, but under a misapprehension of or in ignorance of the law, pays the tax under protest, and to avoid a threatened sale of the property by the tax collector, it is to be deemed a voluntary payment, and he cannot recover back the money in a suit against the tax collector. *Ib.*
 3. *For benefits — Exemption from.*] The act incorporating the prosecutors declares that their property "shall not be subject to taxes or assessments." *Held*, that the words "taxes or assessments" are not synonymous, and that they exempt the property from assessments for benefits as well as from taxes for general revenue for public use. Reversing same case, 10 Am. R. 223. *State v. Newark* (N. J.), 464.
- By mutual insurance company.*] See INSURANCE, 280.

ATTORNEY AND CLIENT.

1. *Debt for moneys collected.*] An attorney acts in a "fiduciary character" in collecting claims for his client, and a debt due the client for moneys thus collected is not barred by a discharge in bankruptcy. *Heffren v. Jayne* (Ind.), 281.
2. *Attorney may be witness.*] An attorney who has opened a case and examined witnesses therein is a competent witness for his client. *Holmes v. Walker* (Penn.), 671.

AUTREFOIS ACQUIT.

See CRIMINAL LAW.

BAILMENT.

Liability of bank for deposits for safe-keeping] See BANKING.

BANK.

See NATIONAL BANK.

BANKING.

1. *Check — how far banks are bound to know indorsements — Forgery of intermediate indorsement.*] A bank is not required to know any of the persons who indorse a check drawn upon it, except the one who presents it for payment; nor is it authorized to withhold payment until it is furnished with direct proof that the signatures of the indorsers preceding the one presenting it are genuine. In cases of this kind the rule is that the bank must know that the signatures of the drawer and the person who presents it for payment are genuine, under penalty of liability to pay it again in case either of the signatures are shown to be a forgery. But if it be shown that the signatures of the indorsers which precede that of the one receiving payment is a forgery, the bank cannot on that account be held to a second payment. *Levy v. Bank of America* (La.), 124.
2. Where the holder presents a bill or check for payment, the title to which he has derived through prior indorsements, he undertakes with the drawee that these indorsements are genuine, and that he has a valid title. *Redington v. Woods* (Cal.), 190.

3. *Raised check—payment by drawee—laches in failing to return altered check - Indorsement — how far drawee bound to know handwriting.*] Plaintiff gave to a stranger his check on a bank for thirty dollars. The stranger afterward presented it, raised in amount and so altered as to make defendant the payee, to defendant in payment for legal tender notes, and defendant received it in good faith and delivered the legal tender notes. Defendant indorsed it and presented it to the bank on which it was drawn for payment and it was paid. The forgery having been discovered, the defendant was notified thereof, but no formal demand for a return of the money paid him was made for nine days, nor was the check ever returned or offered to be returned to defendant. In an action by the plaintiff to recover the money it was stipulated that the court might determine whether the loss should fall on the plaintiff, the defendant or the bank. *Held*, (1) that the bank was not presumed to know the handwriting in the body of the check, and that in the absence of suspicious circumstances or of *laches* after the discovery of the fraud, the bank would be entitled to recover the money paid; but that the failure of the bank or of the plaintiff to return or to offer to return the check, was a valid defense to the action; (2) that defendant's indorsement imposed upon him no other or greater liability to refund the money paid than would attach to him without the indorsement. *Ib.*
4. *Liability of, for deposits for safe-keeping.*] In an action to recover of a bank the value of bonds deposited for safe-keeping by plaintiff, and stolen by the teller of the bank, *held*, that the bank being a gratuitous bailee was not liable, although an examination of the teller's accounts, after the theft, proved them to have been falsely kept, and showed that he had been abstracting funds for two years, and although it was known to the president of the bank that he had dealt once or twice in stocks. Mistaken confidence is not a ground of liability in such causes *Scott v. Nat. Bank of Chester Valley* (Penn.), 711.
5. *Liability of bank to holder of check.*] G. drew a check on a bank payable to C. B. indorsed the check without authority from C. and drew the money on it from the bank. The check was charged by the bank against G. and returned canceled to him. C. obtained the canceled check from G. and presented it to the bank for payment, which was refused. *Held*, that C. could recover the amount of the check from the bank. *Seventh Nat. Bank v. Cook* (Penn.), 751, and *note*, 752.
- 6 Where a bank receives a check drawn upon it and charges it against the drawer and settles with him upon that basis, the payee of the check has a right of action against the bank for the amount of the check. *Ib.*

BANKRUPTCY.

1. *Fiduciary character—attorney and client.*] A claim against an attorney for money collected by him for a client is "a debt created while acting in a fiduciary character," within the meaning of the bankrupt act, and is not barred by a discharge in bankruptcy. *Haffren v. Jayne* (Ind.), 261.
2. *Of corporation—subsequent action against.*] Under the United States bankrupt law a creditor proved his debt in bankrupt proceedings against

a corporation. *Held*, that the corporation was not thereby discharged, and that the debt might be prosecuted in a State court. *Ansonia Brass and Copper Co. v. New Lamp Chimney Co.* (N. Y.), 476.

3. *Promise to pay debt after discharge.*] In an action on a promissory note, defendant pleaded his discharge in bankruptcy. Upon the trial plaintiff offered evidence of a promise to pay the note made by the defendant subsequent to the discharge. *Held*, that the evidence was admissible, that the action was well brought upon the original demand, and that the new promise could be proved in avoidance of the discharge. *Dusenbury v. Hoyt* (N. Y.), 548.

BATTERY.

See ASSAULT AND BATTERY.

BETTING AND GAMING.

When contract based on a wager not illegal.] *See* CONTRACT, 96.

BIBLE.

Reading of in the public schools.] *See* CONSTITUTIONAL LAW, 238.

BLANKS.

In bills and notes, right of holder to fill.] *See* NEGOTIABLE INSTRUMENT, 218.

BONDS

Purchase of stolen negotiable bonds, good faith of purchaser.] *See* NEGOTIABLE INSTRUMENTS.

BRIDGE.

Over navigable river.] *See* WATER AND WATER-COURSE, 255

BROKER.

1. *Illegal contract—action on.*] A broker procured a customer for another broker with the understanding that the latter should charge for the procuring a loan of money at a rate prohibited by the statute, and that such commissions should be divided; *held*, that a suit would not lie in behalf of the former broker for his share of such commissions against the latter broker, to whom they had been paid by the customer. *Gregory v. Wilson* (N. J.) 448.
2. *Effect of not obtaining license.*] A commercial broker who has not procured a license as required by the act of Congress of June 30, 1864, *held*, not entitled to recover his commissions in a State court. *Holt v. Green* (Penn.), 737.

CARRIER.

1. *Railroad—failure to start train according to time-table — Evidence.*] Plaintiff was the purchaser of a season ticket on defendant's road, between S. and M. Defendants published a time-table advertising a train from S., 8.45 A. M., to M. at 9.35 A. M. On a certain day plaintiff was at the depot at S. in time to take this train, but it did not stop there. In assumpsit by plain-

tiff for damages against defendant for a failure to transport him punctually to M. on the day in question, defendants offered to prove that the road was suitably conditioned for ordinary travel, and had accommodation for any anticipated excess on extraordinary occasions; that upon this day an unusual and unexpected number of persons took passage from stations before reaching S., and that it could not accommodate more with safety, the cars being already overloaded; that, as several persons were waiting at S. besides plaintiff, they could not have discriminated if they could have accommodated any more; that they had eighteen passenger coaches and one baggage car on this train and could not have stopped at S., being on an up-grade, without its being impossible to start again; and that as soon as it could be done safely the company sent a train to S. to bring the passengers there waiting to M. This evidence was all excluded. *Held*, that the offered evidence was improperly excluded, because it tended to free the defendants of the imputation of negligence in not doing all in its power to transport the plaintiff punctually according to its time-table. *Gordon v. Manchester and Lawrence R. R. Co.* (N. H.), 97.

- 2 *Limitations on railroad tickets — "good this day only."* Plaintiff purchased a ticket of a railroad company marked on its face "Good this day only," and with the date of issue stamped on the back. He did not attempt to use the ticket until seven days afterward, when he presented it to the conductor on the train, but refused to pay his fare. The conductor then ejected him from the train, in accordance with the company's regulations. *Held*, that the conductor was not liable to plaintiff in damages. *Elmore v. Sands* (N. Y.), 617.

3. A limitation on a railroad ticket that it shall be "Good this day only" is reasonable and valid. *Ib.*

Negligence of.] See NEGLIGENCE, 570.

See COMMON CARRIER.

CATTLE.

Carriers of, not common carriers.] See COMMON CARRIER.

CHALLENGE.

See CRIMINAL LAW.

CHECK.

See BANKING.

CHURCH.

Meaning of "divine service." Injunction.] The G. congregation and the L. congregation entered into articles of association to build a church in which "divine service" only should be held. For a period of twenty years no other than meetings for public worship or preaching the gospel were held in the church. Sunday schools were not in existence in the neighborhood when the church was built. *Held*, that the G. congregation was entitled to an injunction restraining the L. congregation from holding a Sunday school in the church. *Gass' Appeal* (Penn.), 726.

COMMERCIAL AGENCY.

Liability of, as collecting agent.] See AGENCY, 665.

COMMON CARRIER.

1. *Who is — carrier for a particular occasion.*] Defendant undertook for hire, to transport plaintiff's goods in his boat. *Held*, that he thereby made himself liable as a common carrier. *Moss v. Bettis* (Tenn.), 1.
2. *When tow-boat is.*] A tow-boat used in towing barges or other water craft, which are loaded with freight, from one point to another on the river, is a common carrier, and the persons owning such tow-boat, who undertake to tow a barge, loaded with freight or merchandise, from one given point to another on the Mississippi river, first giving a bill of lading for the transportation of the cargo on board of the barge, are liable for the delivery of the cargo at the port of destination, the same as if it had been placed on board the tow boat herself. *Bussey v. Mississippi Valley Transportation Company* (La.), 120.
3. —.] The value of goods shipped on board of a barge at St. Louis, to be towed to New Orleans by a tow boat, may therefore be recovered from the company owning the tow-boat, in case of loss while on the trip, resulting from the negligence, carelessness, or want of skill in the persons managing the tow-boat. *Id.*
4. *Transportation of cattle.*] A common carrier transported cattle, which the owner had assumed the responsibility of placing in the vehicles, and they were injured *in transitu*, either from their own fault or the mode of loading them, but through no fault of the carrier. *Held*, that the carrier was not liable for such injuries, and did not insure against them. *Bisford v. Smith* (N. H.), 42, and note, 53.
5. *Discrimination in carriage of freight — Action for.*] Where an action was brought against a railroad company for an alleged unjust discrimination in favor of an express company, by affording better and extra facilities to it for transportation than to the plaintiff, and the defendant demurred. *Held*, that an action would lie for damage caused by such discrimination; and also *held*, that though the unreasonable preference was practiced in another State, if in violation of the law thereof, the action would still lie. *McDuffee v. Portland & Rochester Railroad* (N. H.), 72, and note, 87.
6. —.] An agreement by a railroad company to carry goods for certain persons, at a cheaper rate than it will carry under the same conditions for others, is void, as creating an illegal preference. *Messenger v. Pennsylvania Railroad Company* (N. J.), 457.
7. *Termination of liability — notices to consignee.*] Plaintiff, a resident of Michigan, on removing to G., in New York, four miles from S., delivered goods to a railroad company, directed to plaintiff at S. The goods arrived at S. over defendant's railroad, but no one was present to receive them. They were then removed into defendant's warehouse, where at the end of three days they were consumed by fire, without defendant's fault. The agent in charge of the warehouse had made inquiries in regard to the residence or whereabouts of plaintiff, but could obtain no information. It appeared that previous to the arrival of the goods plaintiff called for them,

but gave no information as to place of residence or address. *Held*, that plaintiff ought to have given such information to defendant, before the arrival of the goods, as would have enabled defendant to give the requisite notice to plaintiff; that defendant's liability as common carrier had been changed to that of warehouseman, and plaintiff could not recover for the loss. *Pelton v. Rensselaer & Saratoga Railroad Company* (N. Y.), 568, and *note*, 569.

CONSTITUTIONAL LAW.

1. *Statute of limitation — reviving action.*] After the bar of the statute of limitation has become complete, neither the legislature nor a constitutional convention can revive the remedy or furnish a new one. *Yancy v. Yancy* (Tenn.), 5.
2. *Females not entitled to vote.*] Women are not entitled to vote by virtue of the fourteenth or fifteenth amendments to the Constitution of the United States. *Van Valkenburgh v. Brown* (Cal.), 186.
3. *Exempting mortgages from taxation.*] A State Constitution provided that "all property in this State shall be taxed in proportion to its value." *Held*, that an act exempting mortgages and debts secured by mortgages from taxation was in violation of the Constitution, and void. *People v. Eddy* (Cal.), 148.
4. *Bible in the public schools.*] The Constitution of Ohio does not enjoin or require religious instruction, or the reading of religious books in the public schools of the State. *Board of Education of the City of Cincinnati v. Minor* (Ohio), 283.
5. —.] The legislature having placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what books shall be read therein. *Ib.*
6. *Acts for the removal of causes to federal courts.*] The acts of Congress allowing a non-resident plaintiff to remove a cause from a State court to the federal courts are constitutional. *Burson v. National Park Bank* (Ind.), 285, and *note*, 295.
7. *Act restraining removal of suits.*] A State statute providing that corporations created in other States shall agree as a condition to transacting business within the State, not to remove suits against them into the federal courts is unconstitutional. *Morse v. Home Ins. Co.* (U. S. Sup. Ct.), 297.
8. *Statutes authorizing taking of lands for private roads unconstitutional.*] A statute authorized the taking of lands by eminent domain for private roads on payment of damages. *Held*, unconstitutional. *Wild v. Delg* (Ind.), 399, and *note*, 404.
9. *Local option law valid.*] The Chatham local option law declares the retail of ardent spirits without license to be unlawful, and provides that no license shall be granted if a majority vote of the township is for "no license." *Held*, that the act is constitutional. *State ex rel. Sanford v. Court of Common Pleas* (N. J.), 422, and *note*, 426.

CONTRACT.

1. *Wagering contract.*] At a meeting to make arrangements for a squirrel hunt, it was agreed that the beaten party was to pay for the supper of the victors, and the captains of each party (the defendants) engaged the plaintiff to furnish the supper. The plaintiff presided at the meeting, and understood and knew how the suppers were to be paid for. *Held*, in an action against defendants for the supper for the whole party, that plaintiff was entitled to recover. *Winchester v. Nutter* (N. H.), 93.
 2. *Immoral—Sales to keeper of house of prostitution.*] A dealer in furniture or other articles of commerce has the right to trade with and make sales of furniture to a person engaged in keeping a house of prostitution, and the courts will enforce such rights by compelling the person who purchases the furniture to pay for it, although it be shown that the vendor knew at the time of the sale the use to which the furniture was to be applied. *Hubbard v. Moore* (La.), 128.
 3. *Contract against public policy—Petition for street improvements.*] Some of the abutters on a street, in order to secure the requisite number of signatures to a petition for the improvement of the street, agreed to pay part of the sum assessed on other abutters, provided they would sign the petition. In an action on the agreement, *held*, that it was against public policy and void. *McGuire v. Smock* (Ind.), 353.
 4. *Contracts of intoxicated persons.*] The contracts of a person intoxicated at the time they were made are voidable, but not void, and to defend against a contract on the ground of drunkenness it must have been rescinded by restoring whatever was received as the consideration thereof. *Jost v. Williams* (Ind.), 377, and *note*, 381.
 5. *In restraint of trade. Contract not limited as to territory void.*] Defendant agreed with plaintiff not to engage for eight years in the manufacture of a certain yeast powder, nor in any branch of the yeast powder business. *Held*, void, as an undue restraint of trade. *Callahan v. Donnelly* (Cal.), 172, and *note*, 173.
 6. *Maritime contracts.*] Contracts for building ships or vessels or for labor done or materials furnished in their construction are not maritime contracts. *The Scow M. Tuttle v. Buck* (Ohio), 270, and *note*, 273; see also, *Edward v. Elliott*, 463.
- Liability of owner of vessel on contract of master.*] See SHIP AND SHIPPING, 204.
- To tow.*] See SHIP AND SHIPPING, 264.
- Illegal contract between brokers.*] See BROKERS, 440.

CONVERSION.

- Measure of damage.*] In an action for the conversion of stock, the highest market value between the conversion and the day of trial is not the measure of damage, but it *seems* that the proper measure is the highest price reached by the stock after the conversion and notice thereof to the plaintiff, up to a reasonable time for him to replace it. *Baker v. Drake* (N. Y.), 507.

COPYRIGHT.

See TRADE-MARK.

1

1. *Transfer of stock.*] Mandamus will not lie to compel the books of stock in a private corporation; the one entitle damages. *Kimball v. The Union Water Company* (Cal.,
2. *Subscription-payment.*] The statute required as a condition of incorporation of a company, that a certain amount of stock be subscribed for, and ten per cent in cash thereon actually paid in. *Held*, that payment of the ten per cent, made by check drawn against a sufficient fund, and which would be on presentation, was sufficient. *People v. The Stockton and San Joaquin River Company* (Cal.), 178.
3. *Removal of cause to federal court.*] Corporations are citizens of the State which creates them within the meaning of that clause of the United States which extends the judicial power of the United States to controversies between citizens of different States, and the right of a corporation created in one State but doing business in another State, to have a cause transferred to the federal court, is not abridged by an act of the latter State, making the same a condition to doing business within the State. *Western Union Telegraph Company v. Dickinson* (Ind.), 295; *Morse v. Home Insurance Company* (Sup. Ct.), note, 297.

Forfeiture of franchise by non-performance.] See FORFEITURE OF FRANCHISE.

Bankruptcy of — Subsequent action against.] See BANKRUPTCY.

Liability of for acts of agents.] See MASTER AND SERVANT.

Concerning real estate—when personal—Party wall. V. and D. being desirous of erecting a building on a lot, entered into an agreement with V. whereby it was covenanted that the wall of the house should be a party wall, built one-half by V. and one-half by D. V. covenanted that whenever he, his heirs or assigns, should build on his lot, he or they would pay D. or his assigns for such use. The agreement was recorded. Subsequently D. assigned his lot to plaintiff and conveyed his lot to other parties. V.'s lot was conveyed by various conveyances, to defendant, who built thereon, using the wall so used. In an action by plaintiff against defendant for the value of the wall so used, *held*, that the agreement between V. and D. did not bind D. or his land so as to give a right of compensation in favor of the plaintiff, but that the plaintiff was not to recover against the grantee of V. or the defendant, and that the plaintiff could not recover against defendant although the latter purchased the lot with constructive notice of the agreement. *Cole v. Hughes* (N. Y.), 611.

When binding on grantee in deed poll. See DEED, 556.

1 *Challenges by State.*] Where two or more persons are jointly, the State is entitled to no more peremptory challenge than if the trial is against one alone. *State v. Earle* (La.), 109.

2. *Rape — aiding and abetting.*] A person who stands by when an attempt is made by others to commit a rape, but who does no act to aid, assist or abet its commission, is not guilty of an attempt to commit a rape; the question of his complicity is for the jury. *People v. Woodward* (Cal.) 176, and note, 177.
3. *Larceny from several owners.*] Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment and the taking thereof charged as one offense. *State v. Hennessey* (Ohio), 253.
4. *Larceny — Obtaining property by artifice.*] Defendant falsely represented to the wife of M. that M. had been arrested for a crime, and had sent him to her for some money. The wife gave him a watch and chain to pawn, the money and ticket to be given to M. Defendant made the representations and received the goods with the intent to appropriate the same to his own use. *Held*, that he was guilty of larceny. *Smith v. People* (N. Y.), 474.
5. —.] If by trick or artifice the owner of property is induced to part with the custody or naked possession to one who receives the property *animus furandi*, the owner still meaning to retain the right of property, the taking will be larceny. *Ib.*
6. *Former acquittal — Where same act causes death of two — Identity of crime.*] Indictment for the murder of A; plea, former acquittal of the murder of B, which crime "was and is identical in all its parts, incidents and circumstances with the crime charged in the indictment" on trial, and that "the evidence whereby alone the State will attempt to prove the indictment in this cause is the same and no wise different from that employed on the trial" of the former indictment. *Held*, that the plea was good without an averment of the identity of A and B. *Clem v. State* (Ind.), 369.
7. —.] Where the same act results in the death of two or more persons, and the person committing the act is convicted or acquitted on the trial of an indictment for the murder of one, he cannot be indicted for the murder of the other. *Ib.*
8. *Evidence of one crime to prove another.*] Defendant was indicted for the murder of his wife by poison. There was evidence of his criminal intimacy with the wife of S., on whose life was an insurance, the proceeds of which on his death defendant tried to procure. *Held*, that evidence that S. died with the same symptoms as defendant's wife, and had been attended by defendant, was inadmissible. *Shaffner v. Commonwealth* (Penn.), 649.
9. *Homicide — evidence of threats.*] On the trial of a prisoner for murder evidence was given making it a question for the jury whether the case was one of excusable homicide on the ground of self-defense, evidence was then offered of violent threats made by the deceased but not communicated to the prisoner. This was excluded. *Held*, error. The evidence was admissible to show whether deceased did in fact attempt to do the prisoner bodily harm. *Stokes v. People* (N. Y.), 493.
10. *Witness — impairing credibility.*] On a murder trial T. was a material witness for the accused, and on cross-examination for the purpose of impair

ing her credibility, she was asked whether she had not taken things which did not belong to her when she left M., her employer. The prosecution was then allowed to contradict T., in this collateral matter, by the testimony of M. *Held*, error. *Ib*.

11. *Evidence of another indictment.*] The minutes of the grand jury, showing that an indictment had been found against the accused, upon the complaint of the deceased, for blacknailing, were received in evidence. *Held*, error, there being no proof to show that the deceased knew of the action of the grand jury. This evidence was not admissible, even to show that the accused had been guilty of another crime. *Ib*.
12. *Murder — burden of proof.*] The judge at the trial instructed the jury in effect that the law implied motive and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter or excusable homicide. *Held*, error; nor was the error cured by a subsequent charge that if the evidence was doubtful, or if the jury entertain reasonable doubts, so that they do not know where the truth lies, the prisoner is entitled to the benefit of that doubt. *Ib*.
13. *Written testimony of deceased witness.*] A prisoner was charged with murder, and on a preliminary hearing before the magistrate the testimony of a witness for the State was taken in writing. *Held*, that the notes of the testimony were admissible in evidence on the trial of the prisoner, the witness having died. *Brown v. Commonwealth* (Penn.), 740.
14. *Dying declarations.*] A man bearing marks of violence was found dead about three hundred yards from his house. His wife was found in the house with wounds of which she subsequently died. The house had the appearance of having been robbed. *Held*, that the dying declarations of the wife were not admissible on the trial of a prisoner for the murder of the husband. *Ib*.

Challenge of jurors, act relating to.] See JURY, 493.

CUSTOM.

Evidence of not admissible to change legal effect of contracts.] Sales of goods "to arrive by" a certain time do not import a warranty that the goods shall arrive by the day named, and evidence that by the custom of merchants the words "to arrive by" a certain time, mean "deliverable by" that time, is inadmissible as tending to change the legal effect of the contract. *Rogers v. Woodruff* (Ohio), 376.

DAMAGES.

1. *Loss of profits.*] Loss of profits may be recovered as damages for the non-performance of a contract, if the loss results directly from the breach of the contract itself, or is such as might reasonably be supposed to have been in the contemplation of both parties at the time of the making of the contract as the result of non-performance; provided that the profits to be compensated for are such as are capable of being ascertained by the rules

of evidence, to a reasonable degree of certainty. *Wolcott v. McInt* (N. J.), 488.

2. *Measure of damages for conversion of stock.*] Defendants as brokers bought stock for plaintiff, which they were to hold subject to plaintiff's order. Plaintiff deposited a "margin" with defendants, but otherwise paid nothing for the stock. In an action for an unauthorized sale, the judge charged the jury that plaintiff was entitled to recover the difference between the amount for which the stock was sold and the highest market value which it reached at any time after the sale and down to the day of trial. *Held*, error. It seems that the advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after plaintiff had received notice of the sale, is the true measure of damages. (Overruling *Markham v. Jaudon*, 41 N. Y. 235.) *Baker v. Drake* (N. Y.), 507.
 3. *To land—when claim for does not pass by deed of the land.*] Plaintiff was the owner of land through which a railroad was constructed damaging the land. She contracted to sell the land to S., who assigned the contract to defendant. Defendant effected a settlement with the railroad company for damages done to the land in constructing the road. Plaintiff, without knowledge that defendant had received the damages from the company, delivered the deed to defendant pursuant to contract. *Held*, that she could recover the damages of defendant. Such damages are personal, and do not run with the land or pass by the deed. *McFadden v. Johnson* (Penn.), 681.
 4. *Executory contracts—rights of assignee—Measure of damages for non-performance. Market value—how determined.*] A sold oil to B "to be delivered, seller's option," at any time until December 31st, at thirteen and one-half cents per gallon. B assigned the contract to C, and afterward B entered into a combination to raise the price of the oil in market. C was not implicated in the combination. In an action against A for non-delivery of the oil, *held*, that the right of C to recover was not affected by the acts of B; but that in estimating the damages, the fictitious and temporary price of the oil, resulting from the "corner" in the market, was not the true market value, and the jury would be at liberty to determine, from the prices immediately before and after the date for delivery and from other sources of information, the actual market value of the oil. *Kowals v. Kirkpatrick* (Penn.), 687, and note, 696.
- Measure of damages for breach of warranty of garden seeds.*] See SALE, 428.

DEED.

1. *Exception of part taken for a road.*] Grant by deed of land, "saving and excepting from the premises hereby conveyed, all and so much and such part and parts thereof as has been lawfully taken for a public road." *Held*, that the fee in the soil of the road, and not merely an easement, was reserved to the grantor. *Munn v. Warrall* (N. Y.), 470.
2. *Liability of grantee in deed poll—effect of covenant.*] Plaintiff conveyed to W. land by warranty deed, signed only by plaintiff. The deed contained a covenant on behalf of W. and his heirs and assigns that they would not erect upon the land any distillery. A portion of the land came into pos-

IND

session of defendants through various means, but not contain the covenant against leasing frequently erected one. *Held*, that an assignment of the defendants from using the distiller's assigns, although he did not sign the assignment, is binding. *Dock Company v. Leavitt* (N. Y.), 55 N. Y. 2d 303.

DEVIA'

See SHIP AND S

DEVI

See W

DOW

Release of by fraudulent deed.] A release of a husband for that purpose is binding only as against the releasee. A fraudulent conveyance is set aside at the transfer of the premises, as against the wife, in the event of her subsequent dower as against such owner. *Ibid*, 303.

DRAINAGE

See CONSTITUTION

DRUNKEN

Effect of on contracts.] *See* CONTRACTS, 87

DYING DECL

See CRIMINAL

EASEME

1. *As to flow of surface water.*] A superior owner of the surface water flow from his land to the owner of the lower lands will be liable. *v. Connor* (Cal.), 213.
2. *Basement of light — when sustained.*] Light will be sustained only in cases of necessity or rejected in cases where it appears to be a nuisance, at a reasonable cost, have or subject. *Powell v. Simms* (W. Va.), 639.
3. The English common-law doctrine of A

EJECTME

1. *Against agent of United States — Prerogative.*] A writ of ejectment may be brought against an officer of the United States for possession of the demanded premises.

or fortification under the direction of the Secretary of War or of the President of the United States. *Polack v. Mansfield* (Cal.), 151.

2. *Against mortgages.*] Ejectment will not lie by a mortgagor against a mortgagee in possession so long as the mortgage subsists. *Hubbell v. Moulton* (N. Y.), 519.

ELECTION.

Disqualification of one candidate — Different officers in same board.] At an election of commissioners, where it was doubtful as to whether two or three vacancies existed, A and B were elected to fill the two conceded vacancies, and C was also declared elected "in case a vacancy is found to exist." C thereupon applied for a mandamus to compel the delivery to him of a commission on the ground that A was disqualified. *Held*, that C was not entitled to the office, even if A was disqualified. *Price v. Baker* (Ind.), 346.

EMINENT DOMAIN.

For private road.] A statute authorizing the taking of lands for a private road by eminent domain is unconstitutional. *Wild v. Deig* (Ind.), 399, and *note*, 404.

ESTATE.

Devise — life estate — Remainder — Power.] H. bequeathed to his wife, if living at his death, the whole of his estate for use and disposal for life, and "what is remaining at her decease undisposed of by her," to D. On the death of H., his widow (who had also property, real and personal, in her own right) took possession of his estate under said will. The widow then made her will, in which, after some specific devises, she bequeathed to B. "all the rest and residue of (her) estate, real, personal and mixed, wherever found and however situated." *Held*, (1) that by the first will, the widow took an estate for life with a power to defeat the remainder, and that D. took, not an executory devise, but a vested remainder; (2) that the second will did not operate to defeat the remainder given to D. by the first. *Burleigh v. Glough* (N. H.), 28.

EVIDENCE.

1. *Foreign judgment — proof of after verdict.*] Plaintiff offered in evidence a copy of a record of a judgment rendered in another State. The copy was not duly authenticated but the court admitted it and the plaintiff had a verdict. *Held*, that the verdict might stand and judgment be rendered thereon, upon the plaintiff's furnishing to the court a duly authenticated copy of the record. *Hutchins v. Gerrish* (N. H.), 19.
2. *Of defect in highway.*] In an action against a town for injuries occasioned by a defect or obstruction in the highway which frightened plaintiff's horse, evidence that other horses have been frightened by the same defect is admissible. *Darling v. Westmoreland* (N. H.), 55.
3. *Waiver of objection to — motion to strike out.*] If one party offers himself as a witness, and the other objects because the objector is the representative of a deceased person, and the court decides to take the evidence with leave to the other party to move to strike it out, the motion to strike out must

be made when the direct examination is closed. By cross-examining the witness generally, the other party waives the motion to strike out. *King, v. Haney* (Cal.), 217.

4. *To contradict affidavit of subscribing witness to will.*] The record of a will, together with the affidavit of the subscribing witnesses made at the time of probate, being offered in evidence; *held*, competent for the opposing party to show statements made out of court by one of the subscribing witnesses, in order to contradict the statements of such affidavit as to the due execution of the will. *Otterson v. Hofford* (N. J.), 429.

5. *Unstamped instrument.*] A written agreement made in April, 1868, but not stamped according to Act of Congress, is not admissible in evidence in a State court. *Chartiers & Robinson Turnpike Company v. McNamara*, (Penn.), 673, and see note, 681.

Of application of a libel.] See LIBEL, 169.

Of custom not admissible to vary law.] See CUSTOM, 276.

Of the due passage of statutes.] See STATUTES.

Of marriage.] See MARRIAGE, 733.

Of misrepresentation in application for insurance.] See INSURANCE, 405.

See CRIMINAL LAW ; WITNESS, 63.

EXCEPTION.

See DEED, 470.

EXECUTOR.

A promise by one of two or more executors is sufficient to take a debt of the testator out of the Statute of Limitations. *Shree v. Joyce* (N. J.), 417.

EXPLOSION.

See INSURANCE, 228.

EXPRESS COMPANY.

When liable for moneys collected, as agent, on a forged draft.] See AGENT.

Liability of as carrier.] See COMMON CARRIER.

FIRE.

Communication of by negligence.] See NEGLIGENCE, 323.

FIXTURES.

When intention will control.] The owner of an elevator purchased from the plaintiff an engine and boiler to place therein, and to secure a part of the purchase-money gave his promissory note, secured by chattel mortgage upon the property, wherein it was stipulated that the engine and boiler should be and remain personal property until the note was paid. They were placed upon a foundation outside of the elevator and a house built over them. *Held*, that the engine and boiler continued personal property until the note was paid, as against a prior mortgagee of the realty *Tyft v. Horton* (N. Y.), 537.

Proof of after verdict.] See EVIDENCE, 19.

FORFEITURE.

Of franchises by non-performance.] If a franchise is granted by the legislature to construct a street railroad within a certain time, with a condition that if the provisions of the act are not complied with the franchise shall be forfeited, a failure to lay the track within the time limited, works a forfeiture of the right to lay the same without a judgment at the suit of the State declaring a forfeiture, and the legislature may confer the franchise upon any other company or person. *Oakland R. R. Co. v. Oakland, Brooklyn, etc., R. R. Co.* (Cal.), 181.

FORGERY.

A bank is not affected by the fact that an indorsement on a check, prior to that of the person presenting it for payment, is forged. *Loy v. Bank of America* (La.), 124.

Defaced check, when bank bound by payment of.] See BANKING, 190.

FORMER ACQUITTAL.

See CRIMINAL LAW.

FRANCHISE.

Forfeiture of, by non-performance.] See FORFEITURE, 181.

FRAUDULENT CONVEYANCE.

1. *Who is creditor—Slander.]* One having a cause of action for slander is a creditor within the meaning of the statute against fraudulent conveyances. *Shan v. Shay* (Ind.), 806.
2. —.] The defendant in an action of slander, after the words were spoken, but before the action was brought, conveyed his land without consideration to defeat any judgment the plaintiff might recover. *Held*, that the conveyance was fraudulent. *Ib.*

FRAUD.

1. *Action for, by wife—Inchoate right of dower will be protected. Joint action for several injuries. Misrepresentations as to value.]* A man was induced by fraudulent representations to convey land, his wife joining in the conveyance to release dower. *Held*, (1) that the wife had a right of action for deceit in respect of her inchoate right of dower; (2) that the husband and wife could maintain a joint action; and, (3) that whether a representation as to the value of property is merely the expression of an opinion or an affirmation of a fact, is a question for the jury. *Simar v. Canaday* (N.Y.), 528.
2. *Sale of goods fraudulently obtained—when bona fide purchaser not protected.]* J. S. who pretended to represent B. & Co. called upon D. and contracted with him for wool to be consigned to B. & Co. at P. J. S. also called upon B. & Co. and pretended to be the son of D. and contracted to sell them

wool. The wool was shipped by D., consigned to B. & Co., but was received by J. S. who delivered it to B. & Co. and received the value of it. *Held*, that D.'s title was not divested and that B. & Co. were liable to him. *Barker v. Dinmore* (Penn.), 697.

In procuring signature to a promissory note.] See NEGOTIABLE INSTRUMENTS.
Liability of partner for fraud of copartner.] See PARTNERSHIP. 4

GOVERNOR.

1. The governor of a State cannot be compelled by mandamus to perform acts required by law to be done by him. *State v. Warmouth* (La.), 126, and note, 128.
2. When the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected. *State v. Doherty* (La.), 181.
3. The governor of a State may pardon for contempt. *State v. Sawenot* (La.), 115.

HIGHWAY.

1. *Defect in — evidence of.*] Where an action was against a town for defect in a highway, and the alleged defect was a pile of lumber by the side of the road which frightened plaintiff's horse, evidence was offered to show that other horses were frightened in passing it. *Held*, that such evidence was admissible and its exclusion error. *Darling v. Westmoreland* (N. H.), 55.
2. *Law of the road.*] When a driver attempts to pass another going in the same direction on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself. *Acagno v. Hart* (La.), 133, and note, 135.
3. *Improvement of — petition for — Illegal compact.*] An agreement by some of the abutters on a street to pay the assessments of other abutters for an improvement of the street, in consideration that the latter would sign the petition for the improvement in order to get the requisite number of names, is against public policy and void. *McGuire v. Smock* (Ind.), 353.
4. —.] A foot traveler has no priority of right over vehicles on the streets of a city. *Belton v. Baxter* (N. Y.), 578.

HUSBAND AND WIFE.

1. *Wife's note — sureties.*] The sureties to a promissory note of a married woman who knew of the coverture at the time of signing, are liable on the note, even though the principal be not. *Davis v. Statts* (Ind.), 382.
2. *Dower — court will protect inchoate right of — joint action for fraud.*] Where a man was induced by fraudulent representations to convey lands, his wife joining in the deed to release dower. *Held*, (1) that the wife had a right of action for deceit in respect of her inchoate right of dower, and (2) that

the husband and wife could maintain a joint action for their several injuries. *Sinar v. Canaday* (N. Y.), 528.

To what extent fraudulent deed is binding as a release of dower.] See DOWER, 251
Evidence of marriage.] See MARRIAGE, 783.

IMMORAL CONTRACTS.

See CONTRACTS.

INDICTMENT.

See NUISANCE; CRIMINAL LAW.

INDORSEMENT.

See BANKING.

INSURANCE.

FIRE INSURANCE.

1. *Construction of policy—Use of kerosene oil for lights.*] Where a policy of fire insurance upon goods in a store contained a clause prohibiting the use of any burning fluid or chemical oils, and a subsequent clause expressly permitting the use of kerosene oils for lights in dwellings. *Held*, that the use of kerosene oil as a light in the store rendered the policy null and void. *Corf v. Home Insurance Company* (Cal.), 165.
2. *What constitutes a "dwelling."*] Where the owner of a store, in which the insured goods were, slept in a small back room at the store, with his clerk, but kept a kerosene lamp burning at night in the store, for protection against burglars. *Held*, that such use did not constitute the premises a dwelling, so as to avoid a clause in the policy which prohibited the use of kerosene light in the store. *Id.*
3. *Construction of policy—Explosion.*] A policy of insurance against loss or damage by fire contained a condition that the company would not be liable "for damage to property by lightning, aside from fire, * * * nor for damages occasioned by the explosion of a steam-boiler, nor for damages by fire, resulting from such explosion, nor explosions caused by gun-powder, gas, or other explosive substances." *Held*, that the company is not exempted by this clause from liability for damage by fire resulting from an explosion of gas, but is thereby exempted from damage occasioned by the explosive force of the gas without communicating fire to the insured property. *Boatman's Fire and Marine Insurance Company v. Parker* (Ohio), 228.
4. *Mutual insurance company—Assessment.*] In an action to recover an assessment upon a premium note given to a mutual insurance company, it must be alleged in the complaint, and proved upon the trial, that the losses to be paid accrued during the membership of the defendant in the company. *Manlove v. Bender* (Ind.), 280.
5. *Proof of loss.*] To comply with the condition of a fire policy, requiring as particular an account of the loss and damage as the nature of the case will admit, where all the books, invoices and vouchers are preserved, the in-

the reinsure. *Marine v. The International Life Insurance Society of London* (N. Y.), 530.

Removal of cause by insurance company into federal court.] See REMOVAL OF CAUSE.

INTEREST.

On judgment.] See JUDGMENT, 454.

INTOXICATION.

Effect of on contracts.] See CONTRACTS, 877.

INTOXICATING LIQUORS.

Local option law — power of legislature.] See CONSTITUTIONAL LAW.

JUDGMENT.

Interest on judgment.] A judgment was entered when the legal rate of interest was six per cent. Held, that such rate was not to be increased after the passage of an act making seven per cent the legal rate. See v. Mariott (N. J.), 454.

Of another State — Proof of.] See EVIDENCE.

JURISDICTION.

*Service of process on non-resident.] A joint action was brought in Massachusetts against A, a resident of that State, and B, a resident of Pennsylvania. Process was served on A, and the court ordered that the plaintiff give notice to B by service of a copy of the order. B, in Pennsylvania, indorsed the order, "I accept service of this writ." A judgment by default was obtained against both defendants, and the plaintiff sued B in Pennsylvania, on the judgment. Held, that the Massachusetts court obtained no jurisdiction over B, and that the judgment against him was invalid. *Scott v. Noble* (Penn.), 663.*

JURY.

*Challenge of — act relating to.] The New York Act of 1872, relating to challenge of jurors in criminal cases, provides that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror who may have formed or expressed, or has such an opinion or expression, shall declare on oath that he believes that he can render an impartial verdict, and provided that the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict. Held, constitutional. The act properly applies to trials of offenses committed before its passage. *Stotes v. The People* (N. Y.), 493.*

LARCENY.

See CRIMINAL LAW.

LEX LOCI.

An action may be maintained against a common carrier in the courts of one State for an unjust discrimination practiced in another State in violation of the laws thereof. *McDuffee v. Portland & Rochester R. R. Co.* (N. H.), 72, and *note*, 87.

LIBEL.

1. *Evidence of the application of the libel.*] In an action for a libel in which the name of the plaintiff is not mentioned, the plaintiff may, for the purpose of proving that the libel referred to him, introduce witnesses to testify that they knew the parties and were familiar with the relations existing between them immediately prior to and at the time of the publication, and that on reading the publication they understood the plaintiff to be the person referred to. *Russell v. Kelley* (Cal.), 169.
2. *Subsequent publication.*] In an action for a libel in which the name of the plaintiff is not mentioned, a subsequent publication by the defendant, in which the plaintiff's name is mentioned, may be introduced in evidence to show that the former publication referred to the plaintiff. *Id.*

LIEN.

A lien imposed by a State statute in favor of one who furnishes materials for the construction of a vessel may be enforced in the courts of the State. *The Scow M. Tuttle v. Buck* (Ohio), 270, and *note*, 273.

LIFE ESTATE.

See ESTATE.

LIFE INSURANCE.

See INSURANCE.

LIGHT.

Ancient — Easement of.] See EASEMENTS, 629.

LIMITATION OF ACTIONS.

1. *Action cannot be revived after once barred.*] After the bar of the statute of limitation has become complete, neither the legislature nor a constitutional convention can revive the remedy or furnish a new one. *Yancy v. Yancy* (Tenn.), 5.
2. *Method of computing time.*] The statute provided that actions for account should be commenced "within six years next after the cause of such actions, and not after." The last item of an account was dated October 6, 1862, and an action thereon was commenced October 6, 1868. *Held*, that the action was not barred. *Menges v. Frick* (Penn.), 781, and *note*, 783.
3. *Promise by executor.*] A promise by one of two or more executors is sufficient to take a debt of the testator out of the statute of limitations. *Stross v. Joyce* (N. J.), 417.

4. *Bar of statute does not operate as payment.*] E. subscribed for twenty shares of the capital stock of a railroad company, amounting to \$2,000, and paid all but \$1,000. The company brought an action against E. for the balance due on his subscription. E. successfully interposed the statute of limitations, in respect to \$800 of the amount claimed. Plaintiff, the receiver of the estate of E., afterward commenced an action against the railroad company to compel it to issue the twenty shares subscribed for by E. *Held*, that the statute of limitations did not pay the subscription, and plaintiff was not entitled to the relief demanded. *Johnson v. Albany, etc., R. R. Co.* (N. Y.), 607.

LIQUOR.

Local option laws — power of legislature as to.] See CONSTITUTIONAL LAW.

LOCAL OPTION LAWS.

See CONSTITUTIONAL LAW.

MANDAMUS.

1. *Against a governor.*] The governor of a State cannot be compelled by mandamus to perform acts required by law to be done by him. *State v. Warmouth, Governor* (La.), 126, and *note*, 128.
2. *Will not lie to compel transfer of stock.*] One entitled to stock in a private corporation has a right of action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company's books, and therefore mandamus will not lie to compel the transfer. *Kimball v. The Union Water Company* (Cal.), 157.
3. By 2 R. S. 587, § 37, it is provided that in case a verdict shall be found for the person suing out an alternative writ of mandamus, a peremptory mandamus shall be granted to him without delay. *Held*, that the relator is not entitled to a peremptory mandamus after verdict in his favor, where the record shows no legal right in respect to matters of fact. *People v. Batchelor* (N. Y.), 430.

MARITIME CONTRACTS.

1. *Lien for materials for construction of vessels.*] Contracts for building ships or vessels, or for labor done, or materials furnished in their construction, are not maritime contracts. *The Scow M. Tuttle v. Buck* (Ohio), 370, and *note*, 373; See *Edward v. Elliott*, 463.
2. —.] Under the act to provide for the collection of claims against steamboats and other water-craft, one who furnishes materials for the construction of a vessel, has a lien on the vessel, and such lien may be enforced in the courts of the State in the mode prescribed in the act. *Id.*

MARRIAGE.

Evidence of.] Defendant and M. lived together as husband and wife for nearly forty years; they addressed each other as husband and wife; she bore his name; land was conveyed to her as his wife; and she made a will describing herself as his wife. In an action by a devisee of M. to recover possession of premises claimed by defendant as tenant by courtesy, defend-

ant testified "by mutual consent we lived as man and wife," and again "the marriage ceremony was never performed only by mutual consent;"

I promised to marry her." *Held*, that these facts were evidence of a valid marriage not only as to third persons but as between M. and defendant. *Richard v. Brehm* (Penn.), 733.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Duty of master to notify servant of unusual dangers.*] Defendant claimed title to land occupied by other persons, and who threatened to resist by force any interference with their possession. Defendant knowing this, but without communicating it to plaintiff, employed plaintiff to go with him to the land to do some work, in doing which plaintiff was shot by the persons in possession. *Held*, that he might recover against defendant for the damage so suffered by him. *Baxter v. Roberts* (Cal.), 160, and note, 164.
2. —.] If the master has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the servant to be, he is bound to inform the servant of the fact, and if he fails to do so, he is liable to the servant for such damages as he sustains by reason of such causes. *Ib.*
3. *Liability of corporation for acts of its agents — injury to co-servant.*] Defendant's agent, whose duty it was to make up and dispatch trains and to employ and station brakemen thereon, sent out a train without the requisite number of brakemen. The train parted, and in consequence of the want of necessary brakemen, one part collided with another train, killing plaintiff's intestate, who was also a servant of defendant. *Held*, that the defendant was liable, and that it was no defense that the agent had employed necessary brakemen, who failed to appear in time to go upon the train. *Flike v. The Boston & Albany Railroad Company* (N. Y.), 545.
4. —.] Per CHURCH, C. J. A corporation is liable for negligence or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter should be deemed present and consequently liable for the manner in which they are performed. *Ib.*

See AGENCY.

MERCANTILE AGENCY.

Liability of as collecting agents.] *See* AGENCY.

MORTGAGE.

1. *Mortgages in possession — Rents and profits.*] In an action of ejectment by the grantee of a mortgagor against the grantee of a mortgagee, plaintiff offered evidence to show that the mortgage debt had been paid by the

receipt by the mortgagee while in the possession of the land, of rents and profits sufficient to satisfy it. *Held*, that the evidence was properly excluded. In the absence of an agreement between the parties there is no legal satisfaction of a mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until the rents and profits are applied by judgment of a court in satisfaction of the mortgage. *Hubbell v. Moulton* (N. Y.), 519.

2. *When ejectment will not lie against mortgages.*] Ejectment will not lie by a mortgagor against a mortgagee in possession, so long as the mortgage subsists. *Id.*

3. *Equity of redemption — sale of on execution.*] A mortgagee of real estate, in possession after default, may cause the equity of redemption of the mortgagor to be sold on execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage. *Trim v. Marsh* (N. Y.), 623.

4. —.] Law exempting mortgages from taxation; *held* unconstitutional.

See CONSTITUTIONAL LAW, 143.

Acknowledgment of — parol evidence as to.] *See* ACKNOWLEDGMENTS, 623.

Mortgage on railroad rolling stock.] *See* RAILROAD, 550.

MUNICIPAL CORPORATION.

See CONSTITUTIONAL LAW; TOWN.

MURDER.

See CRIMINAL LAW.

MUTUAL INSURANCE COMPANY.

See INSURANCE.

NATIONAL BANK.

Validity of mortgage to.] F. gave to a national bank a mortgage to secure notes thereafter to be discounted for him. *Held*, that under the national currency act of June 8, 1864, the mortgage was void, and could not be enforced against the assignee of F. for benefit of creditors of F. *Fowler v. Scully* (Penn.), 699.

NAVIGABLE RIVER.

See WATER AND WATER-COURSES, 255, 266.

NEGLECT.

1. *Communication of fire — proximate and remote causes — construction of chimneys in cities.*] Plaintiff's building was destroyed by fire, caused by sparks from the chimney of defendant's brewery. Both buildings were situated in a populous part of a large and rapidly increasing city. In an action for damages, plaintiff alleged, first, that the chimney was improperly con-

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- structed, and, second, that the defendant was
furnace and chimney. *Held*, that, by reas
brewery, the defendant was bound to exercise
skill, both in the construction and in the use
and that he was liable for any injury caused
and skill. *Gagg v. Vetter* (Ind.), 822.
2. *Master and servant.*] The driver of a horse car
ger so as to render such passenger chargeable
driver. *Bennett v. New Jersey Railroad and T*
 3. *Contributory negligence.*] Where a passenger
the carelessness of the engineer of a railroad c
of his locomotive, it is no defense to show con
driver of the horse car. *Id.*
 4. *Of carrier — contributory negligence of passenge*
ger in a stage sleigh used by defendant, a city
quence of a snow storm which had obstructed
not run. The sleigh was furnished with foot
plaintiff was riding, the inside of the sleigh h
allowed to ride in this position, and their faren
tion. Plaintiff was injured while so riding, b
with the stage sleigh. *Held*, that plaintiff was
negligence *per se*; and that where the drive
negligent, the negligence of the driver of t
relieve defendant from responsibility for the
v. Brooklyn City Railroad Co. (N. Y.), 570.
 5. *Contributory negligence of traveler at railroad cr*
road was obstructed from the view of a travel
approaching a crossing in a wagon. He did n
attempting to cross the track. *Held*, that this
defeating a recovery for the death of the trav
ing train at the crossing. *Pennsylvania Railr*
 6. The failure of a traveler to stop, immediatel
track, is negligence *per se*. *Id.*
 7. *Highway — injury to foot traveler by collision.*] I
street in a city and seeing a car coming and
going faster than the car, made his "calculati
front of the car" before the cart could get up
attempt to cross and passed in front of the ca
the cart and was injured. In an action again
held, that plaintiff was guilty of contribut
recovery. *Belton v. Baxter* (N. Y.), 578.
- Liability of corporation for negligence of agents.*] I

NEGOTIABLE INSTRUM

1. *Promissory note — Blank — right of holder to fil*
on its face payable at a bank, the place for the
at a town named, authorizes the payee, befor

insert the name of a particular bank at such town, in the blank space, so that, whatever limitation of authority may have been imposed by the maker on the payee, the note will be negotiable and governed by the law merchant in the hands of a *bona fide* indorsee. *Gillespie v. Kelley* (Ind.), 111.

2. —.] Defendant made his promissory note payable to himself and indorsed it. No place of payment was inserted, there being a blank after the word "at." Defendant delivered the note to J. S. upon the agreement that it should not be negotiated or stamped, and intending that it should operate simply as a receipt. J. S. subsequently stamped the note and inserted a place of payment in the blank and negotiated it. *Held*, that defendant was liable on the note to a *bona fide* holder for value. *Redlich v. Doll* (N. Y.), 578, and *note*, 578.
3. *Alteration—making note negotiable.*] A material alteration of a promissory note, such as, for instance, changing it to a negotiable note, without the knowledge or consent, either express or implied, of the promisor, vitiates it, although it may be in the hands of an innocent holder. *Morsehead v. Parkersburgh National Bank* (W. Va.), 636.
4. *Fraud in obtaining signature—want of delivery.*] The maker of a promissory note was induced by the fraud and circumvention of the payee to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and the maker did not, after he discovered that he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker and negotiated. *Held*, that the maker was not liable on the note to an innocent purchaser for value and before maturity, 1st, because of the fraud, and, 2d, because of the want of delivery. *Oline v. Guthrie* (Ind.), 857.
5. *Notice of protest—Effect of war on partnership liabilities.*] Defendant, a member of a firm doing business in New Orleans, indorsed the firm name on certain notes. Defendant resided in New York, and while there the war of the rebellion broke out. The other members of the firm continued business in New Orleans, and the notes, on becoming due, were presented at the firm's place of business, where they were made payable, and protested for non-payment. Notices of protest were served at the same place, part of the notices being served personally on B. whom defendant had constituted his agent before the war. *Held*, that defendant was not discharged from liability as indorser. The notices of protest were properly served, although by virtue of the existence of the war the partnership was dissolved. *Hubbard v. Matthews* (N. Y.), 562.
6. *Indorsement.*] It seems that a prior indorser may recover against a subsequent indorser on proof of the proper intent of the parties. *Id.*
7. *Stolen bonds—purchase of—lashes—bona fide purchaser—Evidence.*] In an action to recover the value of two negotiable United States bonds, it appeared that the bonds, with others, were stolen from plaintiff and purchased on the day after the theft, by defendant, a national bank; that on

proclamation, stating that "I do hereby restore said D. to all rights of citizenship possessed by him before his conviction," etc. *Held* that this was not a pardon such as would restore D.'s competency as a witness. *People v. Brown* (Cal.), 148.

PARTNERSHIP.

In reference to lands—fraudulent acts and representations—liability of one partner for fraud of copartner.] Defendant entered into a written agreement to purchase, lease and take refusals of lands on their joint account, and to sell, lease or work the lands so obtained, all losses, expenses, gains and profits to be divided equally among the parties to the agreement. There was evidence that this agreement had previously been in existence by parol. R., one of the defendants, represented to plaintiffs that the lands were oil-producing, whereas the indications of oil had been produced by petroleum poured on the lands through the connivance of J., another of the defendants. R. was cognizant of the fraud, but it did not appear that D., another defendant, knew of it. Plaintiffs purchased the lands, and after discovering the fraud, brought an action against defendants. *Held*, that the agreement entered into by defendants was a partnership and was valid even when existing by parol; also that D. was liable with J. and R. for their fraudulent acts and representations in the transaction of the partnership enterprise. *Uhester v. Dickerson* (N. Y.), 550.

Effect of war on partnership liability.] See NEGOTIABLE INSTRUMENTS, 502.

PARTY WALL.

When agreement as to does not run with the land.] See COVENANT, 611.

PASSENGER.

The driver of a horse-car is not the agent of a passenger so as to render the latter chargeable with the negligence of the former. *Bennet v. New Jersey, etc., Ry. Co.* (N. J.), 435.

PATENTS.

State legislature cannot regulate contracts as to.] A State statute provided that any person taking a written obligation, the consideration whereof is a patent-right, shall, before such obligation is signed by the maker, insert in the body thereof "given for a patent-right." *Held*, unconstitutional, as interfering with the exclusive power of Congress to regulate patents. *Helm v. First National Bank of Huntington* (Ind.), 303.

PAYMENT.

Of money on void assessment.] See ASSESSMENT.

Of stock subscription.] See CORPORATION.

PLEADING.

Where a law is unconstitutional that fact will be considered without its having been pleaded. *People v. Commissioners of Highways* (N. Y.), 551.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

1. *When liable though principal be not — Promissory note of married women.]*
To an action on a promissory note, the defense was that the defendants executed the note as sureties, that no consideration moved to them and that the principal maker was a married woman, and so not liable, of which plaintiff had notice. *Held*, that the sureties were liable on the note there being no fraud, duress, or deceit on the part of the payee in procuring said note. *Davis v. Statts* (Ind.), 882.
2. *When liability of surety unaffected by acts of principal.]* A leased premises to C, and B became surety for the rent. A distrained for non-payment of rent, but C replevied and re-posseessed himself of the goods. *Held*, that the pendency of the replevin suit was not a bar to an action by A against B as surety. *King v. Blackmore* (Penn.), 684.

PRIVATE ROAD.

- Taking lands for by eminent domain.]* A statute authorizing the taking of lands for a private road by eminent domain is void. *Wild v. Deig* (Ind.) 899, and note, 404.

PROMISE.

- To pay after discharge in bankruptcy.]* See BANKRUPTCY, 542.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PROXIMATE AND REMOTE CAUSE.

See SHIP AND SHIPPING, 264.

PUBLICATION.

See LIBEL, 169.

PUBLIC POLICY.

See CONTRACTS.

RAILROAD.

1. *Rolling stock personal property — Mortgage — filing of — rights of directors.]*
In an action to foreclose two mortgages on a railroad and its franchises and equipments it appeared that the rolling stock had, subsequent to the giving of the mortgages, been sold on execution and purchased at a sheriff's sale under judgments in favor of J. S., a director of the railroad company. *Held*, that the rolling stock of the railroad was personal property and the mortgage should have been filed as a chattel mortgage under the law requiring mortgages of personal property to be filed when the possession of the property remains with the mortgagor; that such mortgages having been given before the Act of 1868 (enacting that mortgages by railroad companies of real and personal property need not be filed as chattel mortgages if recorded properly as real estate mortgages), were void as against judgment creditors; and that J. S. could retain the property purchased by him

- under the judgment and execution, as against the mortgagees seeking to foreclose. *Hoyle v. Plattsburgh & Montreal R. R. Co., Viles (N. Y.), 595.*
2. *Regulations—limitation of tickets.*] A limitation on a railroad ticket that it shall be "Good this day only," is reasonable and valid. *Elmore v. Sands (N. Y.), 617.*
 3. *Land damages.*] Where land is sold after a railroad is laid out thereon, but before the land damages are paid, the right to such damages does not pass to the vendee. *McFadden v. Johnson (Penn.), 681.*
 4. *Negligence at crossing.*] The failure of a traveler on a highway, which crosses a railroad, to stop before crossing the railroad line to look for trains, is negligence, *per se.* *Pennsylvania R. R. Co. v. Best (Penn.), 759.*
- Failure to start train on time.*] See CARRIER, 97.

RAISED CHECK.

When bank bound by payment of.] See BANKING, 190.

RAPE.

See CRIMINAL LAW, 173, and note, 173.

RELIGION.

Religious instruction in public schools.] See CONSTITUTIONAL LAW.

REMOVAL OF CAUSE.

1. *Order for appeal after—when cause may be removed—act constitutional.*] In an action commenced by a citizen of another State against a citizen of Indiana, the court, on plaintiff's application, and after a trial, in which the jury disagreed, ordered the cause to be removed into the circuit court of the United States under the acts of Congress. *Held*, (1) that the order was appealable; (2) that the cause could be removed at any time before another trial; and (3) that the acts of Congress allowing a plaintiff to remove a cause into the Federal Courts were constitutional. *Burson v. The National Park Bank of New York (Ind.), 285, and note, 293.*
2. *Corporation—citizenship.*] Corporations are citizens, within the meaning of the clause of the constitution of the United States which extends the judicial power of the courts of the United States to controversies between the citizens of different States; and they are citizens only of the State or sovereignty that created them. *The Western Union Telegraph Co. v. Dickinson (Ind.), 295; Morse v. Home Ins. Co. (U. S. Sup. Ct.), note, 297.*
3. *Removal of cause by foreign corporation.*] The right to have a cause transferred from a State court to the United States court is not controlled or abridged by the act of the legislature of a State authorizing the service of process on the agent of a foreign corporation. *Ib.*
4. —. *State statute limiting right of, unconstitutional.*] A State statute providing that it shall not be lawful for a corporation, organized under the laws of any other State or country, to transact business within the State, without first appointing an agent on whom process can be served, and agreeing not to remove suits into the United States courts, *held* unconstitutional and void. *Morse v. Home Ins. Co. (U. S. Sup. Ct.), 297.*

WITNESS.

1. *Privilege of defendant when witness in his own behalf.*] Where a criminal upon trial offered himself as a witness in his own behalf and was asked question on cross-examination by State's attorney, which he declined answer, on the plea that he could not be compelled to furnish evidence against himself, and the State's attorney argued from such declension the jury under objection by defendant, which the court overruled, and charged the jury that they had the right to consider such declension. *Held* that the respondent had waived the right claimed when he offered himself for a witness, and that he then became subject to all the rules and tests applicable to any other witness. *State v. Ober* (N. H.), 83, and note 93.
2. *When attorney may be.*] An attorney who has opened a case and examined witnesses is a competent witness for his client. *Blanches v. Walker* (Penn.), 671.

WOMEN.

Women are not entitled to vote by virtue of the 14th and 15th amendments to the United States Constitution. *Van Valkenburgh v. Brown* (Cal.), 136.

WORDS.

- "*Divine service.*"] *See* CHURCH, 736.
- "*Dwelling.*"] *See* INSURANCE, 165.
- "*Majority of members elected.*"] *See* STATUTES, 640.
- "*Taxes and assessments.*"] *See* ASSESSMENTS, 464.

ing of a bridge across a river, where the bridge can reasonably be constructed so as not to destroy the navigability of the river. *Id.*

1. *Legislative power—grant how construed.*] Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. *Id.*
9. —.] The commissioners of Lake county, under their powers as such commissioners or as the successors of the Lake and Trumbull Plank-road Co. being empowered only in general terms to erect a bridge across Grand river, are not authorized to construct it in such a manner that it will prevent the navigation of the river. *Id.*
10. *Navigable river—right of riparian owner to build wharf.*] The owner of land bordering on a navigable stream may build a wharf for his own use or for the use of the public, but he must so construct it as not to interfere with the free navigation of the river. *Sherlock v. Bainbridge* (Ind.), 303, and note, 313.
11. *Rights of persons navigating a river to use wharf.*] One navigating a river has the right to land at such wharf as suits his convenience, and if in so doing the current of the river or other circumstances carries the stern of his boat down stream so that a portion of his boat's length lies in front of an adjoining wharf, but still in the navigable water of the river, he is not a trespasser and cannot be made liable for any consequential damages which may be sustained by the owner of the wharf, provided he use due care and dispatch, and subject others to no unnecessary inconvenience. *Id.*

WHARF.

Right of riparian owner to build—use of.] See WATER AND WATER-COURSES.

WILL.

1. *Devise—life estate with power to defeat remainder.*] H. devised to his wife the whole of his estate for use and disposal for life, and "what is remaining at her decease, undisposed of by her," to D. On his death the widow, who had property in her own right, took possession of his estate. She afterward made a will, when she bequeathed to B. "all the rest and residue of (her) estate." *Held*, (1) that by the will of H. the widow took an estate for life with power to defeat the remainder, and that D. took, not an executory devise, but a vested remainder; (2) that the second will did not operate to defeat the remainder. *Burleigh v. Clough* (N. H.), 23.
2. *Evidence to contradict affidavit of subscribing witness.*] The record of a will together with the affidavit of the subscribing witnesses made at the time of probate, being offered in evidence; *held*, competent to show statements made out of court by one of such witnesses, in order to contradict the statements of the affidavit as to the due execution of the will. *Otterson v. Heford* (N. J.), 429.

Of defects in proof of loss.] See INSURANCE, 405.

WAR.

Effect of on partnership liabilities.] See NEGOTIABLE INSTRUMENTS, 502.

WARRANTY.

On sale of goods.] Whether statements made by a vendor in sale of goods are merely expressions of opinion, or a warranty, is a question of fact for the jury. Welcott v. Mount (N. J.), 438.

Implied warranty.] See SALE, 438.

WATER AND WATER-COURSES.

1. *Surface water — inferior heritor cannot obstruct — Easement.] Defendant, owning lands adjoining and below unoccupied public lands of the United States, built an embankment along his lands to obstruct the flow of the surface-water from the adjoining lands. Plaintiff afterward purchased said public lands, and brought this action to recover for damages done to his land and crops by means of said embankment. Held, (1) that plaintiff had a natural easement to have the surface water from his lands flow off upon the lands below, and that defendant was liable for injuries occasioned by obstructing such flow; (2) that defendant could gain no prescriptive right against the United States, and that, therefore, the plaintiff was not prejudiced by the fact that the embankment was built before he purchased the land. Ogburn v. Connor (Cal.), 218.*
2. *Right of land-owner to drain surface water into stream.] Defendant dug ditches in its own land to drain the surface water therefrom into a stream which was its natural outlet, thereby sometimes increasing and at other times decreasing the quantity of water in the stream, to the injury of plaintiff, who was an inferior heritor. Held, that plaintiff had no cause of action. Waffle v. The New York Central Railroad Company (N. Y.), 457.*
3. *Navigable rivers.] The rivers of this State, to the extent that they are in fact navigable, are public highways. Hickok v. Hine (Ohio), 255, and note, 262.*
4. *—.] A river is regarded navigable which is capable of transporting the products of the country, or upon which commerce may be conducted; and its character as a highway is determined by its navigable capacity rather than by the frequency of its use for navigation. Id.*
5. *—.] Obstruction of by bridge.] The entire obstruction of a navigable river where it is used by the public, is a public nuisance, and where such nuisance works a private injury, the party injured may restrain its continuance by injunction. Id.*
6. *—.] The landings and warehouses of individuals on the bank of a navigable river used in connection therewith, are such private property as may be irreparably injured by the destruction of the navigability of the river to such landings and warehouses. Id.*
7. *—.] Corporations or public officers are not authorized to obstruct the navigation of a river, under a legislative grant of power, merely for the bulk.*

2. *Words need not be new.*] The words which compose a trade-mark need not each be new. If the combination thereof be new and be descriptive of the origin of the goods and their ownership by the manufacturer who devises the mark, it will be unlawful for any other person to flog the combination or any important part thereof. *Id.*
3. *Infringement.*] It is unlawful to put up imitation goods under the name of the real manufacturer, and the excuse that such an act was authorized by a person of the same name as that manufacturer, is absurd. *Id.*
4. *Defense.*] The fact that a trade-mark label is copy-righted, but the date of entry is not given as required by the act of congress, is of no importance in a suit in a State court for damages for imitation of a trade-mark. *Id.*
5. *Maker's name — Geographical and descriptive words.*] Wolfe had for a long time made and sold gin labeled "Wolfe's Aromatic Schiedam Schnapps." Cassin began the manufacture of gin, which he bottled in imitation of Wolfe's, and labeled "Van Wolf's" or "Von Wolf's Aromatic Schiedam Schnapps." Held, that Cassin would be restrained from using any colorable imitation of Wolfe's name, or bottles or labels, but that neither of the words "Aromatic Schiedam Schnapps" was entitled to protection as a trade-mark. *Burke v. Cassin* (Cal.), 204.

TRADE.

Restraint of.] See CONTRACTS, 172, and note, 172.

TREES.

Sale of standing trees.] See SALE, 432.

UNITED STATES.

Ejectment against agent of.] An action of ejectment may be sustained against an officer of the United States army who is in possession of the demanded premises for the purposes of a military camp or fortification, under the direction of the Secretary of War or the President of the United States. *Polack v. Mansfield* (Cal.), 151.

VENDOR AND PURCHASER.

Where land is sold after a railroad has been laid out thereon but before the land damages are paid, the right to such damages does not pass to the vendee. *McFadden v. Johnson* (Penn.), 681.

VERDICT.

Impeachment of — Affidavit of jurors.] The affidavits of jurors showing that they agreed upon a basis upon which the calculation of the amount to be recovered should be made, and that there was a mistake in making the calculation, cannot be received on a motion for a new trial. *Wishers v. Ficus* (Ind.), 233.

VESTED REMAINDER.

See ESTATE, 23.

WAGER.

When contract based on not illegal.] See CONTRACT, 92.

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STATUTE OF FRAUDS.

Sale of standing trees.] See SALE, 483.

STOLEN BONDS.

Purchase of—notice to purchaser.] See NEGOTIABLE INSTRUMENTS.

STOCK.

Measure of damage for conversion of.] See DAMAGES.

See CORPORATION.

SURFACE WATER.

See WATER AND WATER-COURSES.

TAXATION.

Exemption from "taxes or assessments," including from local improvements. *State v. Newark*

Tax on particular property—equality of tax. See TAXATION, 747.

Of mortgages.] See MORTGAGES.

See ASSESSMENT.

TIMBER.

Sale of standing timber.] See SALE, 483.

TIME.

Computation of.] See LIMITATION OF ACTIONS, 781.

TOW BOAT.

Liability of as common carrier.] See COMMON CARRIERS.

TOWN.

Liability of for acts of agent.] Where the committee of one to clear land belonging to the town for a contractor, in doing the work, was guilty of negligence, *held*, that the members of the committee were liable, but *quere* would the town be liable. *Wright v. Town of*

Add to railroads.] See CONSTITUTIONAL LAW, 480.

TRADE-MARKS.

1. *When protected.*] The leading principle of the law is, that the manufacturer or merchant who has produced an article of use or consumption that has found its way into the market, who, by affixing to it some name, device or symbol, has distinguished it as *his*, and to distinguish it from all others, shall receive the individual guaranty of its value, shall not be deprived thereof by infringement or imitation. (L.A.), 111.

REPRESENTATIONS.

On sale of goods when a warranty.] See SALE, 488.

RESIGNATION.

Of an officer — when cannot be withdrawn.] See OFFICER.

RESPONDEAT SUPERIOR.

See AGENCY.

RESTRAINT OF TRADE.

See CONTRACTS, 172, and note, 172.

RIPARIAN OWNER.

See WATER AND WATER-COURSES.

RIVER.

See WATER AND WATER-COURSES.

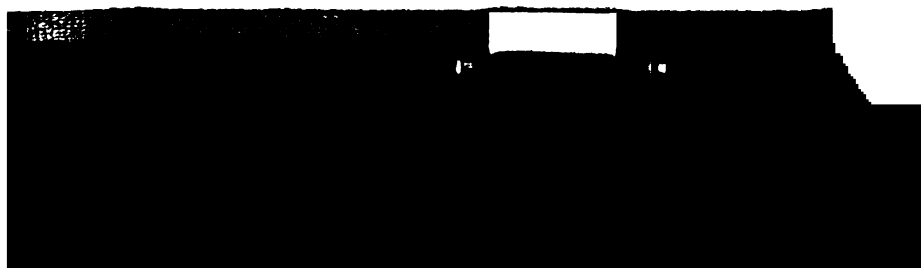
ROAD.

Private road — eminent domain.] A statute authorizing the taking of lands for a private road, by eminent domain, is void. Wild v. Delg (Ind.), 389, and note, 404.

See HIGHWAY.

SALT.

- 1 *Sale "to arrive" by a certain time. Custom — evidence of.] W. contracted with R. for the sale of salt to arrive, the contract being in these words: "Cincinnati, October 18, 1862. Sold J. H. Rogers one thousand sacks coarse Liverpool, and two thousand sacks fine Liverpool salt, at \$2.10 per sack, to arrive by the 15th of November." In an action on such contract by the purchaser against the seller, for failing to deliver the salt; Held, 1. That the words "to arrive by the 15th of November," are words of condition and description only, and do not import a warranty that the salt shall arrive by the day named. 2. In such action, testimony offered by the purchaser to show that by the custom of merchants the words "to arrive by the 15th of November," meant "deliverable by the 15th of November," was properly excluded. Rogers v. Woodruff (Ohio), 276.*
- 2 *Of standing timber.] A sale of standing timber, by the owner of the freehold, is not a sale of a chattel interest, but of an interest in lands, and is not controlled by the doctrine of warranty of title in sales of personal property. Slocum v. Seymour (N. J.), 432.*
- 3 *Standing trees realty.] In no sense can trees, the natural and permanent growth of the soil, be regarded as partaking of the character of emblements or fructus industriales, but are a part of the inheritance, and can only become personalty by actual severance, or by a severance in contemplation of law, as the effect of a proper instrument of writing. Id.*
- 4 *Statute of fraud.] When a contract comprehends an interest in trees standing, with a right in the vendee to sever them, the subject-matter is then an interest in land within the statute of frauds. Id.*









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